133

No. 09-72

Supreme Court, U.S.
FILED
JUL 16 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

DOUGLAS K. BROCAIL,

Petitioner,

v.

DETROIT TIGERS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourteenth District Of Texas

PETITION FOR WRIT OF CERTIORARI

LEVON G. HOVNATANIAN
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Fax

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Labor Management Relations Act, which preempts only claims whose resolution depends on the interpretation of a collective bargaining agreement, preempts the state-law tort claims at issue here.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner

The petitioner is Douglas K. Brocail.

Respondent

The respondent is the Detroit Tigers, Inc. The Detroit Tigers, Inc. is owned by Mike Ilitch. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	10
I. THE FOURTEENTH COURT'S ANALYSIS OF BROCAIL'S CLAIM FOR FRAUDULENT INDUCEMENT CONFLICTS WITH THIS COURT'S HOLDINGS ON FEDERAL PREEMPTION	17
II. THE FOURTEENTH COURT'S ANALYSIS OF BROCAIL'S CLAIM FOR THE FAILURE TO PROVIDE A SECOND OPINION ALSO CONFLICTS WITH THIS COURT'S HOLDINGS ON FEDERAL PREEMPTION	21
III. THE COURT SHOULD GRANT REVIEW TO CLARIFY AND VINDICATE THE STANDARD FOR DETERMINING WHETHER STATE TORT CLAIMS DEPEND ON THE MEANING OF A CBA	25
CONCLUSION	27

TABLE OF CONTENTS – Continued

Page

APPENDIX

Court of Appeals' Opinion ..... App. 1

Court of Appeals' Judgment ..... App. 44

Trial Court's Judgment ..... App. 45

Notice from Court of Appeals that Court granted Douglas K. Brocail's Motion for Extension of Time to File Motion for Rehearing ..... App. 46

Notice from Court of Appeals that Court denied Motion for Rehearing ..... App. 48

Notice from Supreme Court of Texas that Court denied Petition for Review ..... App. 49

Notice from Supreme Court of Texas that Court granted Motion for Extension of Time to File Motion for Rehearing and Filed Motion for Rehearing on February 27, 2009 ..... App. 50

Notice from Supreme Court of Texas that Court denied Motion for Rehearing of Denial of Petition for Review ..... App. 51

Section 301(a) of Labor Management Relations Act (29 U.S.C. § 185(a)) ..... App. 52

Section 418.315(1) of Michigan Worker's Disability Compensation Act ..... App. 54

Detroit Tigers, Inc.'s Motion for Summary Judgment ..... App. 59

Douglas K. Brocail's Response to Detroit Tigers, Inc.'s Motion for Summary Judgment ..... App. 68

Douglas K. Brocail's Brief in Court of Appeals ... App. 79

TABLE OF CONTENTS – Continued

Page

Detroit Tigers, Inc.'s Brief in Court of Appeals .. App. 111

Douglas K. Brocail's Petition for Review ..... App. 129

Detroit Tigers, Inc.'s Response to Petition for Review ..... App. 138

Douglas K. Brocail's Motion for Rehearing in Supreme Court of Texas ..... App. 143

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 14, 16, 17

Alvarado v. Hyundai Motor Co., 908 S.W.2d 243 (Tex. App. – San Antonio 1995), *aff'd*, 974 S.W.2d 1 (Tex. 1998) 11

American Fed'n of State, County & Mun. Employees v. Board of Educ., 577 N.W.2d 79 (Mich. 1998) 3, 4

Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102 (9th Cir. 2000) 12

Brocail v. Detroit Tigers, Inc., 268 S.W.3d 90 (Tex. App. – Houston [14th Dist.] 2008, pet. denied) ..... *passim*

Brown v. NFL, 219 F.Supp.2d 372 (S.D.N.Y. 2002) 16, 17

California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 12

Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997) 20, 21

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 13, 15, 16

Coefield v. Jersey Cent. Power & Light Co., 532 F.Supp.2d 685 (D.N.J. 2007) 22

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (en banc) 15, 16

TABLE OF AUTHORITIES – Continued

Page

Custom Data Solutions, Inc. v. Preferred Capital, Inc., 733 N.W.2d 102 (Mich. Ct. App. 2006) 18

Dougherty v. Parsec, Inc., 824 F.2d 1477 (6th Cir. 1987) 20

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 15

Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991) 20

Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) 26

Gordon v. Thor Power Tool Co., 205 N.E.2d 55 (Ill. Ct. App. 1965) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

Hanks v. General Motors Corp., 906 F.2d 341 (8th Cir. 1990) 20

Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc., 636 N.W.2d 560 (Minn. Ct. App. 2001) 26

Hassberger v. General Builders' Supply Co., 182 N.W. 27 (Mich. 1921) 18

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 13

Hayden v. Reickerd, 957 F.2d 1506 (9th Cir. 1991) 20

Hi-Way Motor Co. v. International Harvester Co., 247 N.W.2d 813 (Mich. 1976) 18

TABLE OF AUTHORITIES – Continued

Page

Hydropress Envtl. Servs. v. Township of Upper Mount Bethel, 836 A.2d 912 (Pa. 2003) 11

Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1 (Tex. 1998) 26

International Ass'n of Bridge, Structural, & Ornamental Iron Workers v. Walcher & Fox, Inc., 535 U.S. 1017 (2002) 19

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 11

Keehr v. Consolidated Freightways, Inc., 825 F.2d 133 (7th Cir. 1987) 20

Kidd v. Southwest Airlines Co., 891 F.2d 540 (5th Cir. 1990) 15

Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987) 21

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) ..... *passim*

Livadas v. Bradshaw, 512 U.S. 107 (1994) 15

Loewen Group Int'l, Inc. v. Haberichter, 65 F.3d 1417 (7th Cir. 1995) 16

Lundborg v. Keystone Shipping Co., 981 P.2d 854 (Wash. 1999) 6

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) 5

Massachusetts Ass'n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176 (1st Cir. 1999) 10

Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1991) 16

TABLE OF AUTHORITIES – Continued

Page

Morton v. Essex Town Sch. Dist., 443 A.2d 447 (Vt. 1981) 3

National Treasury Employees Union v. Chertoff, 385 F.Supp.2d 1 (D.D.C. 2005), *modification denied*, 394 F.Supp.2d 137 (D.D.C. 2005), *aff'd in part, rev'd in part on other grounds*, 452 F.3d 839 (D.C. Cir. 2006) 12

Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc., 270 F.3d 1018 (6th Cir. 2001) 18

Operating Eng'rs Pension Trust v. Wilson, 915 F.2d 535 (9th Cir. 1990) 19

Owens v. Press Pub. Co., 120 A.2d 442 (N.J. 1956) 3

Pharmaceutical Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001) 10

Pharmaceutical Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 27

Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008) 11

Samuel D. Begola Servs. v. Wild Bros., 534 N.W.2d 217 (Mich. Ct. App. 1995) 18

Schoolcraft Mem'l Hosp. v. Michigan Dep't of Cmty. Health, 570 F.Supp.2d 949 (W.D. Mich. 2008) 10

Silverman ex rel. NLRB v. Major League Baseball Player Relations Comm., Inc., 516 F.Supp. 588 (S.D.N.Y. 1981) 4

TABLE OF AUTHORITIES – Continued

Page

St. Louis Cardinals, L.P. v. United States, 185 F.Supp.2d 1043 (E.D. Mo. 2001) 5

Stringer v. NFL, 474 F.Supp.2d 894 (S.D. Ohio 2007) 23, 24, 25

Synagro-WWT, Inc. v. Rush Tp., Pa., 299 F.Supp.2d 410 (M.D. Pa. 2003) 11

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 14

Trans Penn Wax Corp. v. McCandless, 50 F.3d 217 (3d Cir. 1995) 19

Trevino v. Ramos, 197 F.3d 777 (5th Cir. 1999) 13

United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085 (9th Cir. 2008), *rehearing en banc granted*, 545 F.3d 1106 (9th Cir. 2008) 5

United Steelworkers of Am. v. Rawson, 495 U.S. 362 (1990) 17

United Telegraph Workers v. Western Union Corp., 771 F.2d 699 (3d Cir. 1985) 26

Voilas v. General Motors Corp., 170 F.3d 367 (3d Cir. 1999) 19

Wells v. Firestone Tire & Rubber Co., 364 N.W.2d 670 (Mich. 1984) 22

Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257(a) 2

29 U.S.C. § 185(a) ..... *passim*

MICH. COMP. LAWS § 418.315(1) 12, 21, 22

RULES

S. Ct. Rule 10(c) 26

S. Ct. Rule 13.3 2

OTHER AUTHORITIES

John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 9.21 (4th ed. 1998) 18

Diana P. Cortes, *Same Injury; Different Coverage: How Privatized Insurance Policies Affect Injured Elite And Non-Elite Professional Athletes*, 13 Vill. Sports & Ent. L.J. 133 (2006) 4, 5

Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know At His Mother's Knee: The Adverse Effects Of Brown v. Pro Football On Labor Relations In Professional Sports*, 14-SPG Antitrust 41 (2000) 4

Scott R. Rosner, *The History And Business Of Contraction In Major League Baseball*, 8 Stan. J.L. Bus. & Fin. 265 (2003) 5

TABLE OF AUTHORITIES – Continued

Page

Kenneth Starr, et al., *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* 40 (1991) 26

Jason S. Weiss, *The Changing Face Of Baseball: In An Age Of Globalization, Is Baseball Still As American As Apple Pie And Chevrolet?*, 8 U. Miami Int'l & Comp. L. Rev. 123 (1999-2000).....5

OPINION BELOW

The opinion of the Court of Appeals for the Fourteenth District of Texas is reported at *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. App. – Houston [14th Dist.] 2008, pet. denied) (App. 1-43).

BASIS FOR JURISDICTION IN THIS COURT

On April 3, 2008, the Court of Appeals for the Fourteenth District of Texas issued its opinion and judgment affirming the trial court's grant of summary judgment to the Detroit Tigers, Inc. App. 1-44. On April 21, 2008, Douglas K. Brocail timely filed a motion for extension of time to file a motion for rehearing in the Court of Appeals for the Fourteenth District of Texas. App. 46-47.

On May 8, 2008, the Court of Appeals for the Fourteenth District of Texas issued its order granting the motion for extension of time and setting May 19, 2008 as the deadline for the motion for rehearing. App. 46-47. Brocail timely filed a motion for rehearing on May 19, 2008. App. 46-48. On September 25, 2008, the Court of Appeals for the Fourteenth District of Texas issued its order denying the motion for rehearing. App. 48.

Brocail timely filed a petition for review in the Supreme Court of Texas on November 4, 2008. App. 129-137. The order of the Supreme Court of Texas

denying the petition for review was issued on January 30, 2009. App. 51.

On February 27, 2009, Brocail timely filed a motion for extension of time to file a motion for rehearing in the Supreme Court of Texas. App. 50. Also on February 27, 2009, Brocail submitted his motion for rehearing to the Supreme Court of Texas. App. 50.

On March 3, 2009, the Supreme Court of Texas granted the motion for extension of time and filed the motion for rehearing as of February 27, 2009. App. 50. The Supreme Court of Texas issued its order denying the motion for rehearing on April 17, 2009. App. 51.

This petition for writ of certiorari was filed within 90 days of the date the Supreme Court of Texas denied Brocail's timely-filed motion for rehearing. As such, this petition for writ of certiorari is timely filed under Rule 13.3 of the Rules of the Supreme Court of the United States.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (App. 52).

STATEMENT OF THE CASE

For decades, management and unions have negotiated collective bargaining agreements as a way to achieve their respective labor goals. *American Fed'n of State, County & Mun. Employees v. Board of Educ.*, 577 N.W.2d 79, 84 (Mich. 1998). CBAs govern various, and usually many, aspects of union members' employment. *See id.*; *Owens v. Press Pub. Co.*, 120 A.2d 442, 445 (N.J. 1956). Their "very purpose" is "to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group." *Morton v. Essex Town Sch. Dist.*, 443 A.2d 447, 449 (Vt. 1981).

"Unlike contracts of adhesion, parties to a collective bargaining agreement usually are able to negotiate on an even playing field." *American Fed'n*, 577 N.W.2d at 84. That allows employers and unions to fairly work out the terms of their contracts, and to frequently agree on key provisions relating to the business. *Id.*

This case involves Major League Baseball's CBA, which "establish[es] the terms and conditions of employment of Major League Baseball players." *Silverman ex rel. NLRB v. Major League Baseball Player Relations Comm., Inc.*, 516 F.Supp. 588, 591 (S.D.N.Y. 1981). Baseball's CBA was negotiated by a group representing the players and a group representing the teams' owners. Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know At His Mother's Knee: The Adverse Effects Of Brown v. Pro Football On Labor Relations In Professional Sports*, 14-SPG Antitrust 41, 44-45 (2000). "The CBA is enforceable by and against all players and owners within the sport, regardless of whether or not an individual player agrees with the terms of the CBA." Diana P. Cortes, *Same Injury; Different Coverage: How Privatized Insurance Policies Affect Injured Elite And Non-Elite Professional Athletes*, 13 Vill. Sports & Ent. L.J. 133, 152 n.123 (2006).

Baseball's CBA addresses numerous issues involving the game and its players, including the

players' compensation and benefits[1]; free agency[2]; steroid testing[3]; the grievance process[4]; revenue disparities between the teams, the level of revenue sharing, and competitive imbalance[5]; how games would be conducted if a city outside the United States and Canada received rights to a team, and how to handle the expenses, funds, and revenues that international play would generate[6]; and of course the general rules and regulations of the sport[7]. But "[a] collective bargaining agreement, which is a generalized code to govern a myriad of unanticipated cases, involves too

---

[1] *St. Louis Cardinals, L.P. v. United States*, 185 F.Supp.2d 1043, 1045 (E.D. Mo. 2001); Cortes, *Same Injury; Different Coverage: How Privatized Insurance Policies Affect Injured Elite And Non-Elite Professional Athletes*, 13 Vill. Sports & Ent. L.J. at 152.

[2] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001); *St. Louis Cardinals*, 185 F.Supp.2d at 1045.

[3] *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1139-40 (9th Cir. 2008) (Thomas, J., concurring in part and dissenting in part), *rehearing en banc granted*, 545 F.3d 1106 (9th Cir. 2008).

[4] *St. Louis Cardinals*, 185 F.Supp.2d at 1045.

[5] Scott R. Rosner, *The History And Business Of Contraction In Major League Baseball*, 8 Stan. J.L. Bus. & Fin. 265, 286 (2003).

[6] Jason S. Weiss, *The Changing Face Of Baseball: In An Age Of Globalization, Is Baseball Still As American As Apple Pie And Chevrolet?*, 8 U. Miami Int'l & Comp. L. Rev. 123, 128 (1999-2000).

[7] Cortes, *Same Injury; Different Coverage: How Privatized Insurance Policies Affect Injured Elite And Non-Elite Professional Athletes*, 13 Vill. Sports & Ent. L.J. at 152, 152 n.123.

many people, too many problems, and too many unforeseeable contingencies to provide for every situation which might arise." *Gordon v. Thor Power Tool Co.*, 205 N.E.2d 55, 60 (Ill. Ct. App. 1965). Thus, a CBA "does not seek to define every duty and right of the parties to it." *Id.* Indeed,

> there is an extensive landscape of federal and state law dealing with the rights of workers holding that collective bargaining agreements do not supersede and cannot abrogate rights the law accords to workers. A CBA is not impervious to these numerous expressions of public policy, both statutory and court made, that accord greater solicitude to the legal rights of workers.

Lundborg v. Keystone Shipping Co., 981 P.2d 854, 861 (Wash. 1999). Correspondingly, Major League Baseball's CBA was never intended to address, and does not address, every detail relating to a player's employment.

In December 1996, the Detroit Tigers acquired relief pitcher Doug Brocail from the Houston Astros in a multi-player trade. The Tigers signed Brocail to a guaranteed contract under which they were obligated to pay his salary even if he got hurt and became unable to pitch.

Brocail pitched for the Tigers in 1997, 1998, and 1999. But during the 2000 season, he began to experience arm problems. His contract obligated the Tigers to pay him $900,000 in salary in 2000 and $2,000,000 in salary in 2001.

After his arm problems began, the Tigers required Brocail to see their team physicians. Symptoms showed that Brocail was suffering from a partially torn medial collateral ligament. However, one of the Tigers' team doctors claimed that Brocail merely had bone fragments in his elbow and that the fragments could be removed arthroscopically.

In August 2000, the Tigers placed Brocail on the disabled list. They encouraged him to undergo treatment, assuring him that the treatment was appropriate and that he would be pitching for them again soon. Brocail specifically asked whether he had a torn ligament, but was told his injury involved only loose bone fragments.

Convinced, Brocail underwent surgery on September 22, 2000. He then began physical therapy.

As the Tigers knew, Major League Baseball's annual winter meetings, during which a large number of player trades are traditionally made, were approaching in December. If it appeared that the surgery on Brocail was successful, the Tigers could get much more for him in a trade at the winter meetings and relieve themselves of the large guaranteed contract they had given him.

In November 2000, Brocail was still undergoing physical therapy. He could not even throw a baseball yet.

Nevertheless, on November 7, 2000, the Tigers removed Brocail from the disabled list – after the

season was over, less than two months after his surgery, and in time for the impending winter meetings. During those meetings, the Tigers traded Brocail back to the Houston Astros, unloading his $2,000,000 salary.

Before the trade, the Tigers' workers compensation insurance carrier paid Brocail's medical expenses. However, the policy did not provide Brocail any benefits whatsoever for lost earnings and lost earning capacity.

* * *

In reality, Doug Brocail had, not bone chips in his elbow, but a complete tear of the medial collateral ligament and a near-complete tear of the flexor tendon in his pitching arm. He was forced to undergo major surgery to repair the damage.

The Astros paid Brocail his 2001 salary, but he was unable to pitch for the next two seasons. Because his contract expired at the end of the 2001 season, he was out of baseball and received no salary at all in 2002 and 2003.

Only about 68 percent of athletes who have the type of surgery Brocail was required to have to fix the real damage to his arm are able to return to their pre-injury performance level. Yet Brocail returned to baseball during the 2004 season, pitching for the Texas Rangers. And he pitched effectively. However, because of the injuries inflicted on him by the Tigers, his salary had plummeted.

In a Texas court, Brocail sued the Tigers for, among other things, fraudulent inducement and negligence. Specifically, he alleged that the Tigers fraudulently induced him to sign a contract with the Astros, breached a duty to provide reasonable medical services, and failed to provide a proper second opinion.

The Tigers moved for summary judgment. App. 59. They argued that Brocail's claims were preempted by section 301 of the Labor Management Relations Act ("LMRA") by virtue of Major League Baseball's CBA. App. 60-67. In response, Brocail contended that section 301 did not preempt his claims. App. 68-78. In a non-substantive order, the trial court granted the Tigers' motion. App. 45.

Brocail appealed the summary judgment, arguing in his brief that section 301 did not preempt his claims. App. 79-110. The Tigers responded in their own brief that it did. App. 111-128. The Fourteenth Court of Appeals, in Houston, Texas, held that "Brocail's claims of fraudulent inducement and failure to provide a proper second opinion are preempted by the LMRA" and affirmed the summary judgment. *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 111 (Tex. App. – Houston [14th Dist.] 2008, pet. denied); App. 42-43. Later, the court of appeals denied Brocail's motion for rehearing. App. 48.

Brocail filed a petition for review in the Supreme Court of Texas, arguing that the court of appeals had

erred in holding his claims preempted. App. 129-137. The Tigers filed a response, contending that the court of appeals' conclusion that Brocail's claims were preempted was correct. App. 138-142. Ultimately, the Supreme Court of Texas declined review. App. 49.

REASONS FOR GRANTING THE PETITION

> – "Preemption is strong medicine. Thus, although the power to preempt is absolute, its exercise is not lightly to be presumed." *Massachusetts Ass'n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 178-79 (1st Cir. 1999) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

The above quote is one of a host of directives from federal courts not to strain or be anxious to find federal preemption. "Federal preemption . . . is not casually to be dispensed." *Pharmaceutical Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001), *aff'd*, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). "Federal preemption of state law is a serious exercise of federal power that is properly limited to situations of clear congressional intent[.]" *Schoolcraft Mem'l Hosp. v. Michigan Dep't of Cmty. Health*, 570 F.Supp.2d 949, 964 (W.D. Mich. 2008). This Court has gone so far as to impose a

"presumption against preemption," which "'provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.'" *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1013 (2008) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

All these decrees are because "the consequences of preemption are 'severe.'" *Synagro-WWT, Inc. v. Rush Tp., Pa.*, 299 F.Supp.2d 410, 416 (M.D. Pa. 2003) (quoting *Hydropress Envtl. Servs. v. Township of Upper Mount Bethel,* 836 A.2d 912, 918 (Pa. 2003)). Preemption is "a serious inroad into the right of a state" to make and apply its own laws. *Alvarado v. Hyundai Motor Co.*, 908 S.W.2d 243, 245 (Tex. App. – San Antonio 1995), *aff'd*, 974 S.W.2d 1 (Tex. 1998). "Therefore, the preemption cases are interlaid with admonitions against an overeagerness to find preemption." *Id.*

The court of appeals held that Brocail's claims that the Tigers breached a duty to provide reasonable medical services are not preempted by the LMRA. *Brocail*, 268 S.W.3d at 102; App. 21. The court was undoubtedly correct on that point, because the duties implicated by Brocail's claims regarding the failure to provide reasonable medical services did not originate from Major League Baseball's CBA, but from the Michigan Worker's Disability Compensation Act ("the

MWDCA"). *See* MICH. COMP. LAWS § 418.315(1); App. 54.[8]

But the court of appeals also held that the LMRA preempted Brocail's claims that the Tigers fraudulently induced him to sign a contract with the Astros and failed to provide a proper second opinion because those claims require the interpretation of Baseball's CBA. *Brocail*, 268 S.W.3d at 102-03; App. 23-24. Below, Brocail will show the Court that the court of appeals was wrong, and explain why the Court should grant review.

Determining federal preemption is essentially a search for "the intent of Congress." *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Congress passed the LMRA in 1947. *National Treasury Employees Union v. Chertoff*, 385 F.Supp.2d 1, 29 (D.D.C. 2005), *modification denied*, 394 F.Supp.2d 137 (D.D.C. 2005), *aff'd in part, rev'd in part on other grounds*, 452 F.3d 839 (D.C. Cir. 2006). In so doing, its goals were to "promot[e] the arbitration of labor contract disputes [and] secur[e] the uniform interpretation of labor contracts." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108-09 (9th Cir. 2000).

---

[8] It is undisputed that Michigan law applies in this case. The trial court granted the Tigers' motion to apply Michigan law, which was not opposed. The court of appeals also applied Michigan law. *Brocail*, 268 S.W.3d at 103-11; App. 21-43.

In that regard, section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a); App. 52. In some cases, but obviously not in all, this section has preemptive effect. *Wells v. General Motors Corp.*, 881 F.2d 166, 172 (5th Cir. 1989); *compare Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) (observing that section 301 does not preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract") *with Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (noting that section 301 preempts state claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement'") (citation omitted)).

"The intent of LMRA's pre-emptive reach is to fashion a uniform body of law regarding collective bargaining agreements and other labor contracts." *Trevino v. Ramos*, 197 F.3d 777, 779 (5th Cir. 1999). This Court has explained exactly why it is important that section 301 have preemptive scope:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . .
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to provide industrial peace.

Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

But this Court also has observed that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

> [E]ven under § 301 we have never intimated that any action merely relating to a contract

> within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 n.28 (1983).

This "useful" restriction means that "although a plaintiff is a member of the collective bargaining unit, he may assert legal rights independent of the CBA under state law, so long as those rights do not derive from provisions of a CBA." *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 544 (5th Cir. 1990) (citing *Williams*, 482 U.S. at 394-95). If resolving a state-law cause of action does not require construing a CBA, the cause of action is "independent" of the CBA and not preempted. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). Thus, preemption is limited only to claims that "depend[ ] upon the meaning of a collective-bargaining agreement[.]" *Id.* at 405-06.

"The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc). When the parties do not dispute the meaning of contract terms, the fact that a CBA will be consulted in the course of state-law litigation does not require preemption. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). In other words, the court's mere examination of a CBA to determine

the preemption issue is not tantamount to interpreting the CBA. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995); *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993). "If it were, the section 301 pre-emption doctrine would swallow the rule that employees covered by collective bargaining agreements are entitled 'to assert legal rights *independent* of that agreement[.]' " *Milne*, 960 F.2d at 1410 (quoting *Caterpillar*, 482 U.S. at 396) (emphasis in *Caterpillar*). And of course the simple fact that a defense is based on a CBA is by itself insufficient to require preemption. *Williams*, 482 U.S. at 398-99; *Cramer*, 255 F.3d at 690.

That Brocail's claims sound in tort is especially significant. "If there is a free-standing state tort duty, the Supreme Court has repeatedly advised that 'it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Brown v. NFL*, 219 F.Supp.2d 372, 379-80 (S.D.N.Y. 2002) (quoting *Allis-Chalmers Corp.*, 471 U.S. at 211-12). So in tort actions, a court must consider "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp.*, 471 U.S. at 213.

When a tort action brought in state court is not "inextricably intertwined" with a CBA, the claim is considered to be distinct and is not preempted by section 301. *Lingle*, 486 U.S. at 407. Stated differently, if "the state-law claim can be resolved without

interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 410. Thus, the preemption of section 301 does not apply to every state-law claim that relates in some manner to a CBA, or to all parties covered by a CBA. *Allis-Chalmers Corp.,* 471 U.S. at 211-12. And if a tort claim alleges a violation of a duty "owed to every person in society," as opposed to a duty owed only to employees covered by the CBA, it is independent of the CBA. *Brown*, 219 F.Supp.2d at 380 (citing *United Steelworkers of Am. v. Rawson,* 495 U.S. 362 (1990)).

I. THE FOURTEENTH COURT'S ANALYSIS OF BROCAIL'S CLAIM FOR FRAUDULENT INDUCEMENT CONFLICTS WITH THIS COURT'S HOLDINGS ON FEDERAL PREEMPTION.

The court of appeals held that, "Because the CBA governs assignment of his contract, Brocail's claim that the [Tigers] fraudulently induced him to enter a contract with the Astros is preempted. In particular, it is necessary to interpret the CBA to determine whether Brocail's consent to the assignment was necessary, and whether reliance on any representation by the [Tigers] concerning assignment of his contract was reasonable in light of the CBA." *Brocail*, 268 S.W.3d at 103 (citation omitted); App. 23-24.

Whether Brocail's consent was necessary is completely irrelevant. For his consent to be unnecessary

would not legitimize the Tigers' actions. And if his consent was necessary, it still could not have been freely given, because in Michigan as everywhere, "'fraud vitiates everything it touches.'" *Custom Data Solutions, Inc. v. Preferred Capital, Inc.*, 733 N.W.2d 102, 105 (Mich. Ct. App. 2006) (quoting John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 9.21 at 340-41 (4th ed. 1998)).

Furthermore, "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D. Begola Servs. v. Wild Bros.*, 534 N.W.2d 217, 219 (Mich. Ct. App. 1995). No provision of the CBA sets a standard for reasonable reliance or somehow precluded Brocail from relying on the Tigers' representations.

Resolving Brocail's fraudulent inducement claim does not require interpretation of Major League Baseball's CBA. It is state law, not Baseball's CBA, which imposed on the Tigers a duty not to make fraudulent misrepresentations. *See Hi-Way Motor Co. v. International Harvester Co.*, 247 N.W.2d 813, 815-16 (Mich. 1976). That duty, of course, is owed to the general public, not just Brocail. *See Hassberger v. General Builders' Supply Co.*, 182 N.W. 27, 28 (Mich. 1921).

Several courts have held that section 301 does not preempt a state-law claim for fraud. *See, e.g., Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox,*

Inc., 270 F.3d 1018, 1031 (6th Cir. 2001) ("Because ruling on the fraud claim does not involve the interpretation of a collective bargaining agreement, ruling on that claim presents no challenge to the uniformity of federal law governing labor contracts. In short, section 301 does not preempt Walcher & Fox's claim of fraud in the inducement."), *cert. denied*, *International Ass'n of Bridge, Structural, & Ornamental Iron Workers v. Walcher & Fox, Inc.*, 535 U.S. 1017 (2002); *Voilas v. General Motors Corp.*, 170 F.3d 367, 378 (3d Cir. 1999) ("In sum, the fraud claim in this case is not directly based upon the collective bargaining agreements in force between the parties; nor will the resolution of the elements of common-law fraud require the interpretation of those bargaining agreements. . . . Consequently there is no ground for section 301 preemption in this case."); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 232 (3d Cir. 1995) (where employees covered by CBA brought claims against their employer for fraud, court held that section 301 did not preempt fraud claims because "[a]n examination of the employer's behavior, motivation, and statements does not substantially depend upon the terms of the collective bargaining agreement"); *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535, 539 (9th Cir. 1990) ("We hold that the Wilsons' state tort claim for fraud in the inducement is not preempted by section 301 because it does not require reference to the collective bargaining agreement."), *cert. denied*, 505 U.S. 1212 (1992). And it is not just state-law claims involving fraud that fall outside section 301 preemption. Courts

frequently have held that state-law claims of other intentional torts brought by employees covered by a CBA are not preempted, either. *See, e.g., Hayden v. Reickerd,* 957 F.2d 1506, 1511, 1513 (9th Cir. 1991) (conspiracy and battery); *Galvez v. Kuhn,* 933 F.2d 773, 778-80, 781 (9th Cir. 1991) (assault and battery); *Hanks v. General Motors Corp.,* 906 F.2d 341, 345 (8th Cir. 1990) (intentional infliction of emotional distress); *Keehr v. Consolidated Freightways, Inc.,* 825 F.2d 133, 135-37 (7th Cir. 1987) (invasion of privacy and intentional infliction of emotional distress).

Dougherty v. Parsec, Inc., 824 F.2d 1477 (6th Cir. 1987), is a particularly apt example. In that case, the Sixth Circuit held that the plaintiff's tortious interference claim was subject to section 301 preemption. *Id.* at 1478-79. This Court vacated the Sixth Circuit's judgment and remanded the case to the Sixth Circuit for reconsideration in the light of *Lingle*. *Dougherty v. Parsec, Inc.,* 486 U.S. 1049 (1988). The Sixth Circuit promptly reversed its earlier decision. *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989). Under *Lingle* and similar opinions, the court of appeals should have reached a comparable result here.

Cases in which a court has found that an intentional-tort claim is preempted are readily distinguishable. For example, in *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997), the employee's claims for intentional infliction of emotional distress and fraudulently misrepresenting the facts related to his termination were preempted by section

301 because resolution of the claims would require the court to determine whether the employee's discharge was warranted under the terms of a CBA. *Id.* at 1149. And in *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), the employee's invasion-of-privacy claim was preempted by section 301 because resolution of the claim would involve consideration of the employer's power under a CBA to conduct searches of employees and their cars when drug use is suspected. *Id.* at 256. Here, by contrast, it is not necessary to interpret the CBA to resolve Brocail's fraud claim.

II. THE FOURTEENTH COURT'S ANALYSIS OF BROCAIL'S CLAIM FOR THE FAILURE TO PROVIDE A SECOND OPINION ALSO CONFLICTS WITH THIS COURT'S HOLDINGS ON FEDERAL PREEMPTION.

Like their duty not to fraudulently induce, the Tigers' duty to provide a second opinion exists in state law; specifically, in section 418.315(1) of the MWDC. Section 418.315(1) provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

MICH. COMP. LAWS § 418.315(1); App. 54. There is no doubt that this law creates duties that are owed to the general public. *See Wells v. Firestone Tire & Rubber Co.*, 364 N.W.2d 670, 674 (Mich. 1984) ("The statutory workers' compensation scheme was enacted for the protection of both employees and employers who work and do business in this state.").

In holding this claim was preempted, the court of appeals pointed to the fact that the CBA gives the player the right to seek a second opinion from a list of medical specialists. *Brocail*, 268 S.W.3d at 103; App. 22-23. But the court failed to recognize that a duty to provide a second opinion also falls within the "reasonable medical . . . services" required by section 418.315(1) of the MWDC. Because such a duty may be discerned from section 418.315(1), it is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Lingle*, 486 U.S. at 409-10; *see Coefield v. Jersey Cent. Power & Light Co.*, 532 F.Supp.2d 685, 692 (D.N.J. 2007) (quoting *Lingle* and observing that this Court found it "irrelevant" that the state-law analysis may involve the same factual considerations as an inquiry under the CBA).

The recent high-profile case of *Stringer v. NFL*, 474 F.Supp.2d 894 (S.D. Ohio 2007), is analogous. Korey Stringer, an offensive lineman for the Minnesota Vikings, participated in the Vikings' 2001 summer training camp. *Id.* at 898. During a practice, he suffered heat exhaustion. *Id.* At the next morning's practice, he developed heatstroke and subsequently died from its complications. *Id.*

Kelci Stringer, Korey Stringer's widow and the personal representative of his estate, sued several entities. 474 F.Supp.2d at 898. In general, she contended that Korey Stringer was forced to participate in practices conducted in extreme heat and humidity while wearing unsafe, heat-retaining, league-mandated equipment and without proper acclimatization, supervision, or medical care. *Id.*

Count four of her complaint alleged claims of negligence against the NFL and NFL Properties. 474 F.Supp.2d at 898, 911. Specifically, count four asserted that the NFL had a duty to ensure that the equipment and materials it required NFL players to wear were of the highest possible quality and sufficient to protect players from the risk of injury, including an increased risk of heat-related illness. *Id.* at 899, 911-12. Count four also claimed that NFL Properties had a duty to ensure that the equipment and materials it licensed and approved were of the highest possible quality and sufficient to protect players from the risk of injury, including an increased risk of heat-related illness. *Id.* at 899, 912. Count four further alleged that the NFL and NFL Properties

breached those duties by requiring, approving, and/or licensing the use of Riddell helmets and shoulder pads, knowing or having reason to know that those products increased the risk of heat-related illness. *Id.* at 899, 912.

The defendants argued that all of Kelci Stringer's claims should be dismissed because they were pre-empted by section 301. 474 F.Supp.2d at 899. Regarding count four, the court disagreed. *Id.* at 912-13. In part, it reasoned:

> Nor is resolution of Count 4 substantially dependent on an interpretation of any of the terms of the CBA, which is largely silent on the topic of equipment safety. As discussed earlier, although the CBA creates a "Joint Committee on Player Safety and Welfare . . . for the purpose of discussing the player safety and welfare aspects of playing equipment," (CBA, Art. XIII, § 1(a)), the NFL Defendants are not members of that committee and are not required to adopt the committee's recommendations. In short, there is no need to interpret that provision, or any other, to determine whether the NFL Defendants owed Korey Stringer a duty to ensure that he had safe equipment, whether they breached that duty, or whether the alleged breach proximately caused his death. The Court therefore concludes that Count 4 of Plaintiff's complaint is not preempted.

Id. at 912-13. The duty to ensure that the equipment used by NFL players adequately protects against risk

of injury or illness, "if it exists, clearly has its source in the common law," not the CBA. *Id.* at 912.

Similarly, the duty to provide a second opinion exists in Michigan law – separately, independently, from Baseball's CBA. In this circumstance, there is no preemption. *See Lingle*, 486 U.S. at 409-10.

The court of appeals erred in holding that Brocail's claims regarding fraud and the failure to provide a second opinion are preempted. As this Court observed in *Lingle*, "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." 486 U.S. at 411.

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY AND VINDICATE THE STANDARD FOR DETERMINING WHETHER STATE TORT CLAIMS DEPEND ON THE MEANING OF A CBA.

For at least two reasons, the Court should grant review and decide this case. First, the court of appeals drastically relaxed the standard for determining whether state tort claims actually depend on the meaning of a CBA. The court pushed the standard from "intertwined" to, essentially, whether the case has anything at all to do with a CBA.

"The overriding purpose of federal labor law is to allow the parties, to the extent possible, to settle their own disputes in accordance with their contractual

agreements." *United Telegraph Workers v. Western Union Corp.*, 771 F.2d 699, 704 (3d Cir. 1985). But in this case, the plaintiff's claims have nothing whatsoever to do with the parties' contractual agreements. The laudable "overriding purpose" cannot possibly be served by a holding that Brocail's state tort-law claims are preempted by section 301.

"[T]the essence of the exercise [of determining federal labor law preemption] is a balance of state and federal interests." *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984). Here, Texas's interest in providing a tort-law remedy for one of its citizens should have prevailed. Only because the court of appeals applied too loose a standard, it did not.

Second, "[t]he presumption against preemption is a necessary requirement for a properly functioning and well-balanced federal system." *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 564 n.1 (Minn. Ct. App. 2001). It is "crucial in our federal system[.]" *Hyundai Motor Co. v. Alvarado,* 974 S.W.2d 1, 5 (Tex. 1998). "For if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance.'" *Id.* (quoting Kenneth Starr, et al., *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* 40 (1991)).

If Congress intended that federal law preempt state-law remedies, then certainly the presumption

against federal preemption of state law is overcome. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But there is not the slightest indication that Congress intended preemption in cases like this. By concluding otherwise, the court of appeals converted the vital presumption against preemption from gold into dross.

The court of appeals' errors are substantial. The court decided an important federal question – the standard for determining whether state tort claims actually depend on the meaning of a CBA – in a way that conflicts with the relevant decisions of this Court. As such, Brocail respectfully asserts that review is warranted. *See* S. Ct. Rule 10(c).

CONCLUSION

For the above and foregoing reasons, Brocail respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,

LEVON G. HOVNATANIAN
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Fax

Attorney for Petitioner
Douglas K. Brocail

268 S.W.3d 90

Court of Appeals of Texas,
Houston (14th Dist.).
Douglas K. BROCAIL, Appellant,
v.
DETROIT TIGERS, INC., Appellee.
No. 14-06-00557-CV.

April 3, 2008.
Rehearing Overruled Sept. 25, 2008.

Bruce E. Ramage, Levon G. Hovnatanian, Thomas W. Pirtle, Michael Jude Lowenberg, Dale Jefferson, Houston, TX, for appellants.

Jeffrey Stewart Davis, Peter Scaff, Houston, TX, for appellees.

Panel consists of Justices YATES, FOWLER, and GUZMAN.

OPINION

EVA M. GUZMAN, Justice.

In this case, a major league baseball player for the Detroit Tigers (the "Club") sued the Club for injuries to his pitching arm. The Club was granted summary judgment on the grounds, *inter alia,* that the player's claims were barred by the federal Labor-Management Relations Act, the Michigan Workers Disability Compensation Act, and Michigan's statute of frauds. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Douglas Brocail is a professional relief pitcher and a union member of the Major League Baseball Players Association. As such, his employment agreements with major league baseball teams ("Clubs") are subject to a collective bargaining agreement ("CBA") negotiated between the players and the member Clubs. This case concerns alleged acts or omissions that occurred or began during the 2000 baseball season, when Brocail was employed by appellee, the Detroit Tigers, Inc.

A. The Employment Documents

Pursuant to the terms of the CBA, Players and Clubs are required to execute a specific form of a standard contract (the Uniform Player's Contract or "UPC") when entering into an employment agreement. Under the UPC governing Brocail's employment by the Club, he received a $600,000 signing bonus, a salary of $900,000 for the 2000 season, and a guaranteed salary of $2 million for the 2001 season. In section 6(a) of the UPC, the parties agreed that Brocail's contract could be assigned to any other baseball clubs. In section 6(b), Brocail agreed that, "should the Club contemplate an assignment of this contract to another Club or Clubs, the Club's physician may furnish to the physicians and officials of such other Club or Clubs all relevant medical information relating to" Brocail. Brocail further agreed to

"accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, and the Rules or Regulations of the League of which the Club is a member. . . ."[1] These provisions included League Regulation 2, which provides as follows:

> The Player, when requested by the Club, must submit to a complete physical examination at the expense of the Club, and if necessary to treatment by a regular physician or dentist in good standing. . . . Disability directly resulting from injury sustained in the course and within the scope of his employment under this contract shall not impair the right of the Player to receive his full salary for the period of such disability or for the season in which the injury was sustained (whichever period is shorter), together with the reasonable medical and hospital expenses incurred by reason of the injury and during the term of this contract or for a period of up to two years from the date of initial treatment for such injury, whichever period is longer, but only upon the express prerequisite conditions that (a) written notice of such injury, including the time, place, cause and nature of the injury, is served upon and received by the Club within twenty days of the sustaining of said injury and (b) the Club shall have the right to designate the doctors and hospitals furnishing such

---

[1] UPC, ¶ 9(a).

> medical and hospital services. Failure to give such notice shall not impair the rights of the Player, as herein set forth, if the Club has actual knowledge of such injury. All workmen's compensation payments received by the Player as compensation for loss of income for a specific period during which the Club is paying him in full, shall be paid over by the Player to the Club. Any other disability may be ground for suspending or terminating this contract.

The parties also included "Supplemental Agreements" in the UPC, such as the following:

> The Club and the Player covenant that this contract, the Basic Agreement and the Agreement Re Major League Baseball Players Benefit Plan effective April 1, 1996 and applicable supplements thereto fully set forth all understandings and agreements between them, and agree that no other understandings or agreements, whether heretofore or hereafter made, shall be valid, recognizable, or of any effect whatsoever, unless expressly set forth in a new or supplemental contract executed by the Player and the Club (acting by its President or such other officer as shall have been thereunto duly authorized by the President or Board of Directors as evidenced by a certificate filed of record with the League President and Commissioner) and complying with the Major League Rules.

B. Agreement to Provide Medical Services

The Club represents that under an "Agreement to Provide Medical Services" to the Club, the Henry Ford Center for Athletic Medicine (the "Center") agreed to select and provide well-qualified medical doctors to act as "team physicians" in exchange for a fixed annual fee.[2] The Center and the Club further agreed that such physicians would remain employees of the Center, and that the "[a]greement is intended solely for the benefit of the Parties hereto and shall not be deemed to create any rights in any other person or entity." The Center designated Dr. Terrence Lock, a board-certified orthopaedic surgeon, to act as one of the team physicians.

C. Injury and Treatment While Employed by the Tigers

On June 14, 2000 in Detroit, Michigan, Brocail began to complain of pain and inflammation in his right elbow. A follow-up injury report contained the notation that an x-ray performed the same day revealed spurring and new bone formation at the medial epicondyle. Another note entered two days later records that, per Dr. Lock, Brocail had "spurring with inflammation medial epicondyle," but the ligaments and tendons were intact. An injury report also

---

[2] No executed copy of the contract was included in the summary judgment evidence.

records that Dr. Lock examined Brocail again on June 28, 2000, and Brocail was still tender but "getting better," and physicians would "consider CT if [the pain] persist[ed.]" Brocail was examined and x-rayed again on July 10, 2000.

After pitching on August 18, 2000, Brocail experienced increased medial soreness and mild swelling. He was placed on the disabled list; had additional x-rays on August 21; and was examined by Dr. Failla, another physician employed by the Center, on August 22, 2000. The following day, Brocail sought a second opinion from Dr. James Andrews in Birmingham, Alabama. The Club paid for Brocail's consultation with Dr. Andrews.

Brocail returned to Michigan, and at the beginning of September 2000, he was removed from the disabled list. After he practiced pitching on September 6 or 7, 2000, he was again restricted from throwing, and additional tests were performed on September 19, 2000.

On September 22, 2000, Dr. Kyle Anderson, another of the Center's physicians, performed arthroscopic surgery on Brocail's elbow. Dr. Anderson noted "very significant spur formation" and removed two loose bone fragments. The sutures were removed on September 29, 2000, and Brocail was placed on the 60-day disabled list. Brocail decided to return to his home in Missouri City, Texas while recuperating from

surgery, and he received rehabilitation services in the neighboring city of Sugar Land.[3] He was removed from the disabled list in the first half of November 2000, and on or about December 11, 2000, the Club traded Brocail to the Houston Astros. Brocail's medical bills through December 20, 2000 were paid by the Club's worker's compensation insurance carrier.

D. Injury and Treatment While Employed by the Astros

On April 4, 2001, Brocail heard a loud pop in his right elbow while pitching in Texas. He played in four more "rehabilitation outings," then consulted Dr. Thomas Mehlhoff in Houston on April 17, 2001. He was diagnosed with a full tear of the medial collateral ligament and a partial tear of the flexor tendon. He subsequently had surgery in Houston to reconstruct the medial collateral ligament. Due to the long recovery time from the surgery, Brocail did not continue to pitch for the Astros. The Astros paid Brocail's 2001 salary, but when his contract expired at the end of that season, it was not renewed. Brocail was not paid a salary for the 2002 and 2003 seasons. According to Brocail, he returned to pitching for the Texas Rangers in 2004.

---

[3] Brocail had been under contract to the Houston Astros before joining the Detroit Tigers and maintained a permanent residence in Texas.

E. Brocail's Allegations

On September 20, 2002, Brocail sued his Michigan and Texas health care providers. In addition, he sued the Club for negligence, fraud, fraudulent concealment, fraudulent inducement, negligent misrepresentation, gross negligence, and breach of contract. According to Brocail, the Club "encouraged and/or directed him to seek treatment from team personnel that did not possess the expertise, skill, training, experience, ability, competence and/or knowledge to properly diagnose and treat an elbow injury sustained by a major league baseball pitcher. . . ." Brocail further alleged that the Club encouraged or directed him to undergo treatment that would not cure his injury and failed to (a) establish policies and procedures for the treatment of its players, (b) follow team physicians' orders, (c) fully disclose the true extent of his condition and his fitness to play baseball, (d) use reasonable care to protect his health and investment, (e) fully advise him of the adverse effects of continued medical and rehabilitative treatment, (f) advise him of options concerning his condition, (g) perform appropriate examinations, and (h) advise the Houston Astros of the true extent of his ability to play baseball. In addition, he contended the Club was negligent in hiring team personnel. Brocail also pleaded the discovery rule, agency, ostensible agency, agency by estoppel, equitable estoppel, promissory estoppel, vicarious liability, and "intentional torts," and sought punitive damages and attorneys' fees. Finally, he pleaded that:

> [Brocail's] claims are not within the scope of any purportedly applicable worker's compensation laws and are not barred by any exclusive remedy provision therein. . . . As a professional athlete whose average weekly wage was not less than 200% of the state average weekly wage, Brocail had no right to the recovery of weekly compensation benefits and any exclusive remedy provision does [not] apply.[4]

On January 31, 2003, the trial court dismissed Brocail's claims against the Michigan health care providers for lack of personal jurisdiction. *Brocail v. Anderson,* 132 S.W.3d 552 (Tex.App. – Houston [14th Dist.] 2004, pet. denied). Brocail subsequently nonsuited his claims against the remaining health care providers.

F. Summary Judgment

On June 29, 2005, the Club moved for final summary judgment on the following six grounds:

> (i) Section 301 of the Labor-Management Relations Act ("LMRA")[5] preempts and bars Brocail's claims because (a) he did not assert

---

[4] Brocail alleged that "[d]uring the 2000 season, Brocail developed an injury to his pitching elbow while playing for defendant." He further alleged that his "injury occurred in Texas when he was a resident of the State of Texas, . . . and while he was no longer employed by the Defendant."

[5] 29 U.S.C. §§ 141-87.

his claim within the applicable federal six-month statute of limitations, and (b) he failed to exhaust his remedies under the collective bargaining agreement;

(ii) the exclusive-remedy provision of the Michigan Worker's Disability Compensation Act (the "WDCA") bars Brocail's claims;[6]

(iii) Michigan's statute of frauds bars Brocail's claims because the alleged oral promises regarding medical treatment or warranties were not in writing;

(iv) Brocail's promissory estoppel claim fails as a matter of law because (a) any such promise is not sufficiently clear and definite to allow recovery, (b) Brocail could not have reasonably relied upon the alleged promise as a matter of law, and (c) any promissory estoppel claim is not viable in light of the contract between Brocail and the Club;

(v) Brocail's vicarious liability theories fail as a matter of law because (a) the medical providers for whom Brocail contends the Club is vicariously liable are independent contractors, and (b) the purported wrongdoers are within the scope of immunity provided under applicable worker's compensation law; and

---

[6] The Club asserted, in the alternative, that Brocail's claims are barred by Texas workers' compensation law.

(vi) Brocail's "medical fraud" claims fail as a matter of law because (a) Brocail cannot meet the high burden required to show an "intentional act" under Michigan worker's compensation law, (b) Brocail's allegations do not relate to a past or existing fact, (c) his fraud claims are "merely recast medical negligence claims," (d) any alleged misrepresentation could not have caused Brocail injury, and (e) any alleged reliance was unreasonable.

The trial court granted the motion without specifying its grounds. Brocail appeals the judgment regarding his tort claims, but does not appeal the judgment on his claim for breach of contract.

II. ISSUES PRESENTED

Brocail presents nine issues on appeal, and the parties agree that Michigan substantive law applies.[7] In his first issue, Brocail contends the Club failed to assert in its motion for summary judgment that specific parts of the CBA or UPC required interpretation in order to resolve Brocail's claims. He argues in his second and third issues that no interpretation of any part of the CBA or UPC is required, and no part of either agreement created or precluded the

---

[7] We continue to apply Texas procedural law even when applying the substantive law of another state. *Moonlight Invs., Ltd. v. John*, 192 S.W.3d 890, 894 (Tex.App. – Eastland 2006, pet. denied).

duties that are the bases of his tort claims. In his fourth issue, Brocail contends that the exclusive-remedy provision of the WDCA does not bar damage claims for which it affords no compensation. Brocail argues in his fifth issue that the Club failed to negate the misrepresentation, reliance, and causation elements of his fraud claims. In his sixth issue, Brocail contends that the intentional-conduct exception to the exclusive-remedy provision of the WDCA applies. In his seventh issue, he challenges the Club's assertion that the Michigan statute of frauds bars his claims. He argues in his eighth issue that the Club did not meet its burden to negate Brocail's various liability allegations. Finally, Brocail contends in his ninth issue that the Club's misrepresentations are sufficiently definite to support Brocail's claim for promissory estoppel.

III. STANDARD OF REVIEW

We analyze a traditional motion for summary judgment under a well-established standard of review. The movant bears the burden to show that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a(c). We review the motion and the evidence de novo, taking as true all evidence favorable to the nonmovant, indulging every reasonable inference, and resolving any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex.2005). When, as here, the trial court does not specify the grounds on which the judgment is based,

we will affirm the judgment if it is correct on any legal theory expressly placed at issue and supported by the evidence. TEX.R. CIV. P. 166a(c) (stating that issues must be "expressly set out in the motion or in an answer or any other response"); *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex.2001) (per curiam) (holding that when the grounds for the ruling are not specified, we affirm "if any of the theories advanced are meritorious"); *Stiles v. Resolution Trust Corp.,* 867 S.W.2d 24, 26 (Tex.1993) (holding that a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response).

IV. ANALYSIS

The Club's motion for summary judgment was largely based on the application of (a) preemption under the Labor-Management Relations Act ("LMRA"), (b) the exclusive-remedy provision of the Michigan WDCA, and (c) Michigan's statute of frauds. For the sake of clarity, we group the issues presented on appeal under these headings.

A. Labor-Management Relations Act

As its first basis for summary judgment, the Club asserted that Brocail's claims were preempted by section 301 of the LMRA,[8] and thus, Brocail is bound by the requirements of that Act, including requirements

---

[8] 29 U.S.C. §§ 141-87.

to exhaust remedies under the applicable collective bargaining agreement and to assert claims within six months.[9] *See* 29 U.S.C. § 185 (codifying section 301 of the LMRA). Brocail contends that his claims are not preempted, and thus, these requirements do not apply. Preemption under the LMRA is a question of law, which we review de novo. *Meredith v. La. Fed'n of Teachers,* 209 F.3d 398, 404 (5th Cir.2000).

Given the importance of maintaining uniform federal law, "the Supreme Court has made clear that § 301 of the LMRA preempts any state-law claim arising from a breach of a collective bargaining agreement." *Smolarek v. Chrysler Corp.,* 879 F.2d 1326, 1329 (6th Cir.1989) (en banc). Preemption under section 301 also applies to many tort claims ostensibly asserted under state law. *Id.* at 1329-30 (citing *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 217, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)). To survive preemption, tort claims must be "independent" of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 409-10, 108 S.Ct. 1877, 1883, 100 L.Ed.2d 410 (1989); *Allis-Chalmers Corp.,* 471 U.S. at 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (analyzing state-law claim to determine if it was "independent of any right established by contract, or, instead, whether evaluation of the tort claim [was] inextricably intertwined with

---

[9] 29 U.S.C. §§ 141-87. *See DelCostello v. Intl. Bhd. of Teamsters,* 462 U.S. 151, 170-71, 103 S.Ct. 2281, 2293-94, 76 L.Ed.2d 476 (1983) (assigning such disputes the same limitations period found in the National Labor Relations Act); 29 U.S.C. § 160(b).

consideration of the terms of the labor contract"); *Mattis v. Massman,* 2004 Fed.App. 0003P, 355 F.3d 902, 905 (6th Cir.2004) (same). Thus, the LMRA not only preempts state-law claims that are based directly on rights created by a collective bargaining agreement, but also preempts claims that are "substantially dependent upon analysis of the terms made between the parties in a labor contract. . . ." *Stringer v. Nat'l Football League,* 474 F.Supp.2d 894, 900 (S.D.Ohio 2007) (quoting *Allis-Chalmers Corp.,* 471 U.S. at 220, 105 S.Ct. at 1916). But "neither a tangential relationship to the CBA, nor [a] defendant's assertion of the contract as an affirmative defense [can] turn an otherwise independent claim into a claim dependent on the labor contract." *DeCoe v. Gen. Motors Corp.,* 1994 FED App. 0261P, 32 F.3d 212, 216 (6th Cir.1994).

Courts follow a two-step approach to determine whether a state-law tort claim is sufficiently "independent" to survive LMRA preemption. First, the court "must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms."[10] Second, the court "must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state

---

[10] *DeCoe,* 32 F.3d at 216; *accord, Jones v. Roadway Express, Inc.,* 931 F.2d 1086, 1089 (5th Cir.1991) (beginning preemption analysis by examining the elements of the alleged state-law tort).

law."[11] The claim is preempted unless it is created by state law and does not require interpretation of the CBA.[12] If a plaintiff can prove all of the elements of the claim without the need for contract interpretation, then his claim is independent of the labor agreement and is not preempted.[13] But if resolution of the state-law claim is "substantially dependent" on an analysis of the terms of the CBA or "inextricably intertwined" with it, the claim is preempted by the LMRA.[14]

1. Asserted as a Basis for Summary Judgment

In his first issue, Brocail contends that because the Club's motion contains no assertion that any specific part of the CBA or UPC must be interpreted to resolve any of Brocail's claims, the Club did not expressly move for summary judgment on the grounds that Brocail's claims are preempted by the LMRA. Thus, he reasons, summary judgment cannot be affirmed on this basis. The Club responds that Brocail failed to specially except to the motion and therefore waived his complaint that the motion lacked specificity. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex.1993) (plurality

---

[11] *DeCoe*, 32 F.3d at 216.

[12] *Id.*

[13] *Id.*

[14] *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1916.

op.) ("An exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous."); *Franco v. Slavonic Mut. Fire Ins. Ass'n,* 154 S.W.3d 777, 784 (Tex.App. – Houston [14th Dist.] 2004, no pet.) (special exception is required to preserve complaint that a motion for summary judgment is vague or lacks specificity). The excepting party also must obtain a ruling on the special exception to preserve the issue for appeal. TEX.R.APP. P. 33.1; *Franco,* 154 S.W.3d at 784.

Rather than specially excepting to the alleged omission and thereby giving the Club an opportunity to amend, Brocail challenged the alleged omission substantively. In his response, he asserted that the Club "fail[ed] to identify a single provision of the CBA or UPC that must be interpreted to resolve Brocail's tort claims" or "to resolve the factual issues" identified in the motion for summary judgment. According to Brocail's arguments in the trial court, the Club's failure to cite a specific provision of the CBA that requires interpretation demonstrates that no interpretation is necessary to resolve his claims.[15]

---

[15] These arguments seem to rely on the standard governing no-evidence summary judgments, rather than traditional summary judgments. *See Cuyler v. Minns,* 60 S.W.3d 209, 212-13 (Tex.App. – Houston [14th Dist.] 2001, pet. denied) (because movant's failure to identify challenged elements of claims renders a no-evidence motion for summary judgment legally insufficient under Rule 166a(i), the nonmovant is not required to object).

We agree with the Club. A special exception was required to preserve Brocail's argument for appeal. TEX.R.APP. P. 33.1; *Franco,* 154 S.W.3d at 784. And even if Brocail's argument could be construed as a special exception to the motion's lack of specificity, Brocail identifies no ruling in the record on such an exception. *See* TEX.R.APP. P. 33.1(a)(2) (to preserve a complaint for appellate review, the record must show that the trial court implicitly or expressly ruled on the objection, or the complaining party objected to the trial court's refusal to rule). We therefore conclude that Brocail's appellate argument regarding the Club's failure to cite specific provisions of the CBA is waived, and we overrule Brocail's first issue.[16]

2. *Need to Interpret Specific Contract Provisions*

Brocail next contends that the resolution of his tort claims does not require the interpretation of any specific provision of the CBA, the UPC, or the League Regulations. Similarly, he argues in his third issue that these documents did not create or preclude the duties that are the bases of his tort claims. Both arguments are only partially correct.[17]

---

[16] The Club adequately presented the preemption argument in its summary judgment motion.

[17] Interestingly, each party relies for support on statements by the other's expert or counsel. Contrary to its arguments on appeal, the Club's general counsel previously denied that the duty to provide reasonable medical care "is a right that flows

(Continued on following page)

a. Claims Based on Duty to Provide Reasonable Medical Care

In support of his argument that his claims arise under Michigan state law and do not require interpretation of the CBA, Brocail relies on the following

---

from" the CBA and instead agreed that the Club had a duty under Michigan's workers' compensation statutes to provide reasonable medical care. Brocail also reversed his litigation strategy, and the Club relies in part on a June 8, 2005 report by Brocail's expert, Matthew J. Mitten, in which Mitten opines:

> Read together, the Collective Bargaining Agreement, the UPC, and the Regulations establish that a Major League Baseball club, such as the Detroit Tigers, effectively has a non-delegable duty to provide reasonable and appropriate medical care to its players, including an obligation to provide proper treatment and rehabilitation for their injuries.

But see Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. 211, 213 (Fall 2005) ("Unless statutorily excluded from coverage, a professional team's players are 'employees' who are entitled to workers' compensation benefits for injuries occurring within the scope of their employment.").

Despite the efforts of both sides to characterize such statements as relevant evidence, the issue of whether claims are preempted by the LMRA is a question of law to be reviewed de novo. *Bartholomew v. AGL Res., Inc.*, 361 F.3d 1333, 1337 (11th Cir.2004); *Meredith*, 209 F.3d at 404; *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir.1996); *Quesnel v. Prudential Ins. Co.*, 66 F.3d 8, 11 n. 4 (1st Cir.1995). Thus, our analysis is unaffected by the opinions of these witnesses.

provision of Michigan's Worker's Disability Compensation Act:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

MICH. COMP. LAWS ANN. § 418.315(1). The Club, however, argues that Brocail's claims rely on the Club's alleged breach of a contractually-implied duty to provide medical care, and "[w]ithout reference to and reliance on the CBA, the UPC and the Regulations, the Tigers would have no duty or obligation to provide *any* medical services to Brocail."[18]

We need not look for such an implied duty in these agreements because the parties are bound by express state statutes, and the Club could not "opt out" of Michigan workers' compensation law. *See* MICH. COMP. LAWS ANN. § 418.111 ("*Every employer,*

---

[18] In support of this argument, the Club cites *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 862, 107 S.Ct. 2161, 2168, 95 L.Ed.2d 791 (1987) (concluding that it was necessary to interpret a collective bargaining agreement to determine the existence and scope of union's implied duty to ensure a safe workplace). In *Hechler*, however, the plaintiff's claim expressly was based on alleged breaches of "contracts and agreements" and not on the breach of a state statute expressly imposing a duty on the employer.

public and private, and every employee, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby.") (emphasis added). The Club's position is inconsistent with the unambiguous language of section 418.315(1), which requires it to provide reasonable medical care.

Because the determination of the Club's duty and alleged breach of duty to provide Brocail with reasonable medical services can be resolved without reference to the CBA, the UPC, or the Regulations, these claims are not preempted by the LMRA. *See Lingle,* 486 U.S. at 409-10, 108 S.Ct. at 1883 ("[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."). Thus, Brocail's claims that the Club breached a duty to provide reasonable medical care are not preempted by the LMRA. But as discussed *infra,* these claims – which include Brocail's allegations that the Club (i) encouraged or directed Brocail to seek treatment from unskilled team personnel; (ii) failed to seek determination of proper treatment from a skilled physician; (iii) "failed to use reasonable care with plaintiff"; (iv) failed to use reasonable care to protect plaintiff's health; and (v) failed to perform the appropriate examinations to determine his pre-participation or qualifying status, identify future risk of injury, determine his fitness to play baseball, prevent subsequent injury, and assess his rehabilitative status – are barred by the WDCA.

Some of Brocail's claims, however, are not based on the duty to provide reasonable medical care. And as discussed below, we reach a different result concerning the preemption of claims arising from the alleged violation of duties found only in the CBA.

b. Claims Based on Express Contractual Duties

Brocail contends that the Club "failed to provide a proper second opinion before encouraging, endorsing or directing Brocail to undergo treatment. . . ." But Brocail points to no authority in Michigan law that required the Club to "provide a proper second opinion," nor have we found such a requirement.[19] To the contrary, the only basis on which to imply a duty to provide a second medical opinion is found in the CBA.

Article XIII, section D of the CBA is entitled "Second Medical Opinion" and provides as follows:

> Within 20 days following the execution of this Agreement, the Clubs will provide an updated, accepted listing of medical specialists, by specialty and by geographic regions, to whom Players may upon their

---

[19] *Cf.* MICH. COMP. LAWS ANN. § 418.315(1) ("After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician.").

> request go for diagnosis and a second medical evaluation of an employment[-]related illness or injury being treated by the Club physician. At least two physicians will be designated for each specialty in each region. Further, the Association and the Clubs shall promptly agree on appropriate procedures by which this listing of medical specialists will be updated annually. A Player may seek a "second evaluation" from a medical specialist on the accepted listing who is located outside the geographic region within which the Player's Club is located, provided that the Player is not absent from the Club for an unreasonable time.

Thus, to determine whether the Club was required to provide a second opinion and to define the meaning of a "proper second opinion," it is necessary to interpret the CBA. Consequently, this claim is preempted by the LMRA. We therefore overrule Brocail's second and third issues as they pertain to any duty of the Club concerning a "second opinion."

We reach a similar result regarding Brocail's claims arising from his trade to the Houston Astros. Because the CBA governs assignment of his contract, Brocail's claim that the Club fraudulently induced him to enter a contract with the Astros is preempted. *See Burgos v. Sw. Bell Tel. Co.*, 20 F.3d 633, 636 (5th Cir.1994) ("In order to determine whether Southwestern Bell acted wrongfully in the way it transferred [the employee] from one section to another, required him to take different tests, and ultimately

effectuated his termination, an analysis of Southwestern Bell's obligations under the collective bargaining agreement is necessary."). In particular, it is necessary to interpret the CBA to determine whether Brocail's consent to the assignment was necessary, and whether reliance on any representation by the Club concerning assignment of his contract was reasonable in light of the CBA.[20] *See Feitl v. Los Angeles Clippers,* 48 F.3d 1227, 1995 WL 100596, at *3 (9th Cir. March 8, 1995) (unpublished mem. op.) ("Because Feitl knew at the time of the alleged fraud that any employment he might have with LAC was governed by a CBA, Feitl must prove that his reliance was *justified in light of the CBA.*") (citing *Milne Employees Ass'n v. Sun Carriers, Inc.,* 960 F.2d 1401, 1408-09 (9th Cir.1991)). Thus, we overrule Brocail's second and third issues as they pertain to his claim of fraudulent inducement.

B. Michigan Worker's Disability Compensation Act

Under Michigan law, "[e]very employer, public and private, and every employee, unless . . . otherwise specifically provided [in the WDCA], shall be subject to the provisions of this act and shall be bound thereby." MICH. COMP. LAWS ANN. § 418.111. The

---

[20] The CBA contains provisions addressing circumstances in which assignment is prohibited or which require the Player's consent.

WDCA applies to all private, non-agricultural employers who regularly employ three or more employees at one time, excluding family members employed as domestic servants. *See id.* §§ 418.115(a); 418.118(1). In addition, any private employer who purchases and accepts a valid workers' compensation insurance policy, except in the case of domestics and agricultural employees, assumes "the liability for compensation and benefits imposed by this act upon employers." *Id.* § 418.121.

The parties do not dispute that the Club had a valid worker's compensation insurance policy in effect at the time of Brocail's injury, and that medical benefits were paid pursuant to that policy. Thus, the Club is an employer subject to the WDCA. *See id.* §§ 418.111, 418.121. In addition, Brocail is an employee as that term is used in the Act:

> (1) As used in this act, "employee" means:
>
> . . .
>
> (*l*) Every person in the service of another, under any contract of hire, express or implied. . . .
>
> . . .
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render

> service to the public, and is not an employer subject to this act.

Id. § 418.161. The WDCA further provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under the law.

Id. § 418.131(1). Here, Brocail seeks to recover for a personal injury sustained in the course and scope of his employment. Thus, with the exception of intentional torts as described above, the WDCA affords his only remedy.

1. Uncompensated Loss of Earnings

To avoid the exclusive-remedy provision, Brocail points out that section 418.360 of the WDCA bars his receipt of weekly earnings benefits otherwise available under the act:

(1) A person who suffers an injury arising out of and in the course of employment as a professional athlete shall be entitled to weekly benefits only when the person's average weekly wages in all employments at the time of application for benefits, and thereafter, as computed in accordance with section 371, are less than 200% of the state average weekly wage.

(2) This section shall not be construed to prohibit an otherwise eligible person from receiving benefits under section 315,[[21] 319,[22] or 361.[23]

---

[21] Section 418.315 provides, *inter alia*, that:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician.

[22] Under this section:

> An employee who has suffered an injury covered by this act shall be entitled to prompt medical rehabilitation services. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment.

[23] This section governs compensation for scheduled losses.

Id. § 418.360 (internal footnotes referencing prior laws omitted). Thus, Brocail reasons, the exclusive-remedy provision of the WDCA does not apply to his claim for earnings-related damages. Stated differently, he argues that section 418.360(1) provides an exception to the exclusive-remedy provision of section 418.131(1).

In support of this argument, Brocail relies on *Eversman v. Concrete Cutting & Breaking, Inc.*, in which the Michigan Supreme Court explained:

> The primary purpose of the worker's compensation act is to provide benefits to the victims of work-related injuries by allocating the burden of these payments to the employer, and, therefore, ultimately, to consumers. An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because the worker's compensation act, under [section] 418.131(1) . . . provides that this compensation is the exclusive remedy for a personal injury, except for an injury resulting from an intentional tort.

463 Mich. 86, 92-93, 614 N.W.2d 862, 864 (2000) (citations omitted). Because an employer is immunized for tort liability by paying the worker "compensation" for a work-related injury, Brocail contends that the reverse must also be true; thus, he argues, if the employee does not receive "compensation" for lost earnings, then the employer is not immunized from

tort liability for those damages. He argues that "[c]ourts across the country have confirmed that exclusive[-]remedy provisions apply only to damages that are compensable under a worker's compensation statute."

a. *Haddad v. Justice*

In support of this position, Brocail first relies on *Haddad v. Justice,* in which the Michigan Court of Appeals wrote:

> Plaintiffs' complaint contained a claim for property damage and the wife's claim for loss of consortium. As to the wife's claim for loss of consortium, it is barred by [section] 418.131. . . . We find that there is no provision in the Workmen's Compensation Act applicable to plaintiffs' claim for property damage, and, as to it, accelerated judgment was improper.

64 Mich.App. 74, 77, 235 N.W.2d 159, 160-61 (1975).

But *Haddad* does not support Brocail's argument. For example, the WDCA provides no compensation for loss of consortium; nevertheless, the *Haddad* court applied the exclusive-remedy provision to this derivative claim.

Brocail responds that the loss of consortium claim in *Haddad* was not covered because claims under the WDCA are personal. But this proposition is not supported by the language of the Act. *See* MICH. COMP. LAWS ANN. § 418.131(2) ("As used in this

section . . . , 'employee' includes the person injured, his or her personal representatives, *and any other person to whom a claim accrues by reason of the injury to, or death of, the employee*. . . .") (emphasis added). Thus, the exclusive-remedy provision also applies to anyone to whom a claim accrues as a result of the employee's injury or death.

Significantly, the identification of persons to whom the Act applies is based on the injury, not the compensation provided. Regarding the property-damage claim in *Haddad,* section 418.131 provides that the "right to recovery of *benefits as provided in this act* shall be the employee's exclusive remedy against the employer *for a personal injury or occupational disease.*" *Id.* § 418.131(1) (emphasis added). Because the plaintiff's claim for property damage was not derived from the worker's claim of personal injury or disease, it was neither covered nor barred by the WDCA. But *Haddad* does not stand for the proposition that the exclusive-remedy provision is inapplicable to claims arising from an employee's injury simply because the Act provides no compensation for the particular category of damages sought.

b. Sole Exception to the Exclusive-Remedy Provision

Contrary to Brocail's arguments, intentional torts are the "only exception" to the exclusive-remedy

rule.[24] Under Michigan law, the applicability of the workers' compensation act is not determined by whether the claimant is fully compensated for a particular category of damages, because "benefits provided by existing compensation acts are not expected to be full payment for all losses suffered."[25] Instead, it is "a fundamental tenet of workers' compensation statutes that if an *injury* falls within the coverage of the compensation law, such compensation shall be the employee's only remedy against the employer. . . ." *Reed v. Yackell,* 473 Mich. 520, 530, 703 N.W.2d 1, 6-7 (2005) (emphasis added) (quoting *Farrell v. Dearborn Mfg. Co.,* 416 Mich. 267, 274-75, 330 N.W.2d 397, 399 (1982)); *see also Downie,* 122 Mich.App. at 737, 333 N.W.2d at 535 ("When an employee's injury is within the scope of the Worker's Disability Compensation Act, workers' compensation benefits are the employee's exclusive remedy against the employer."); *McKinley v. Holiday Inn,* 115 Mich.App. 160, 163, 320 N.W.2d 329, 331 (1982) (per curiam) ("If the WDCA covers the kind of injury suffered, the act['s] remedy is exclusive even though under the facts of the particular case no

---

[24] MICH. COMP. LAWS ANN. § 418.131; *Bell v. Ren-Pharm, Inc.,* 269 Mich.App. 464, 466, 713 N.W.2d 285, 286 (2006); *see also Downie v. Kent Prods.,* 122 Mich.App. 722, 738, 333 N.W.2d 528, 536 (1983) (stating that "the exclusive remedy provision of the act bars any common law tort cause of action by an employee against his employer"), *aff'd in part and rev'd in part,* 420 Mich. 197, 362 N.W.2d 605 (1984), *amended,* 421 Mich. 1202, 367 N.W.2d 831 (1985).

[25] *Franges v. Gen. Motors Corp.,* 404 Mich. 590, 612, 274 N.W.2d 392, 399 (1979).

compensation is payable because there has been no actual loss of earning capacity."). And although Michigan WDCA benefits do not include weekly wage compensation for a professional athlete with a salary as large as Brocail's, wage compensation is not the only "benefit" provided by the WDCA. Highly compensated athletes remain eligible for benefits such as reasonable medical care, medical and vocational rehabilitation, and compensation for scheduled losses. *See* MICH. COMP. LAWS ANN. § 418.360(2).

Michigan's laws of statutory construction also prevent us from accepting Brocail's interpretation of the WDCA. *See Echelon Homes, L.L.C. v. Carter Lumber Co.*, 472 Mich. 192, 196, 694 N.W.2d 544, 547 (2005) ("We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required *or permitted*, and the statute must be enforced as written.") (emphasis added, citations omitted). As the *Haddad* court emphasized, "Liberal construction [of the Act] applies whether the employee is seeking benefits under the act or resisting application of the exclusive remedy provisions of the act to his cause of action." *Haddad*, 64 Mich.App. at 77, 235 N.W.2d at 160.

Our analysis is unaffected by the cases from other jurisdictions cited by Brocail. *See, e.g., Ivey v. N.C. Prison Dep't*, 252 N.C. 615, 114 S.E.2d 812 (1960); *Davis v. Pioneer, Inc.*, 834 So.2d 739 (Miss.Ct.App.2003); *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga.App.

554, 359 S.E.2d 370 (1987). The *Ivey* case concerned North Carolina statutes and exceptions that apply only to prisoners. *Ivey,* 252 N.C. at 619, 114 S.E.2d at 815. The *Davis* court held that, under Mississippi law, "where an injury is caused by the *willful act* of an employee acting in the course and scope of his employment and in the furtherance of his employer's business, the Workmen's Compensation Act is not the exclusive remedy available to the injured party. . . ." 834 So.2d at 741 (emphasis added) (quoting *Miller v. McRae's, Inc.,* 444 So.2d 368, 371 (Miss.1984)). The Michigan WDCA similarly contains an express exception to the exclusive-remedy provision "when an employee is injured as a result of a *deliberate act* of the employer and the employer specifically intended an injury." MICH. COMP. LAWS ANN. § 418.131(1) (emphasis added). And as in *Haddad,* the court in *Superb Carpet Mills* held that "[t]he benefits conferred by the Act relate to damages for personal injury and not property damage." *Superb Carpet Mills, Inc.,* 183 Ga.App. at 555, 359 S.E.2d at 371. None of these cases support Brocail's argument that professional athletes who are paid at least 200% of the state's average weekly wage are exempt from the exclusive-remedy provision of the WDCA.

c. Application to Brocail's Causes of Action

Because we must apply the exclusive-remedy provision of the WDCA in accordance with its unambiguous meaning, we overrule Brocail's fourth issue.

We affirm summary judgment as to all causes of action pleaded by Brocail other than allegations of an "intentional tort" as defined by section 418.131(1) of the WDCA. *See Eversman,* 463 Mich. at 92-93, 614 N.W.2d at 864; *Am. Bumper & Mfg. Co. v. Nat'l Union Fire Ins. Co.,* 261 Mich.App. 367, 370 n. 3, 683 N.W.2d 161, 162 n. 3 (2004) (noting that any pleaded cause of action that does not include allegations of intentional conduct is barred by the exclusive-remedy provision of the WDCA). Consequently, we hold that Brocail's negligence claims are barred by the Michigan Workers' Compensation Disability Act. *See Harris v. Vernier,* 242 Mich.App. 306, 316, 617 N.W.2d 764, 770 (2000) ("Michigan has long recognized that actions for injuries incurred as a result of a coemployee's negligence and arising out of the scope of employment are barred by the exclusive[-]remedy provision [of the WDCA]."); *cf. Great Am. Ins. Co. v. Queen,* 410 Mich. 73, 89, 300 N.W.2d 895, 897 (1980) ("An employee's common-law right to proceed in tort against persons *other than his employer or co-workers* was not altered by the worker's compensation act.") (emphasis added).

The exclusive-remedy provision also bars those claims that merely restate Brocail's negligence and medical negligence or malpractice claims. *See Jones v. Bouza,* 381 Mich. 299, 302, 160 N.W.2d 881, 882 (1968) (en banc) ("If the [medical] malpractice of a fellow employee, no less than any other negligence of a fellow employee, gives rise to a compensable injury, then workmen's compensation stands as the sole

recourse."). The statute similarly bars his claims based on actual agency, ostensible agency, or vicarious liability for the acts of non-employee health care providers. If the tortfeasor was acting as an employee over whom the Club exercised control, then the WDCA bars the claim. *See* MICH. COMP. LAWS ANN. § 418.131. If the tortfeasor was an independent contractor over whom the Club lacked control, then the Club also is not vicariously liable. *See Janice v. Hondzinski,* 176 Mich.App. 49, 53, 439 N.W.2d 276, 278 (1989). Brocail's agency and ostensible agency theories fail for the same reasons. *See Decker v. Saini,* No. 88-361768 NH, 1991 WL 277590, at *2-4 (Mich.Cir.Ct. Sept.17, 1991) (unpublished) (holding HMO liable for acts of physician because, although HMO was a health care insurer and not a health care provider, the patient reasonably believed, based on the HMO's representations, that the HMO was the physician's agent, and patient looked to the HMO for treatment and not just for payment).

Under any of these theories, Brocail cannot prevail on his negligence claims against the Club. *See Bayless v. Philadelphia Nat'l League Club,* 472 F.Supp. 625, 630 (D.C.Pa.1979) (holding that professional baseball player "clearly placed himself within the ambit of the Workmen's Compensation Act . . . in that he avers 1) the defendant-employer's assumption of a duty to provide proper medical care; 2) the failure to provide that care; and 3) resultant harm."), *aff'd,* 615 F.2d 1352 (3d Cir.1980). Thus, we overrule Brocail's eighth issue as well as his fourth issue.

2. Intentional Torts Exempted from the WDCA's Exclusive-Remedy Provision

The determination of whether a plaintiff has alleged facts constituting a claim for intentional torts is a question of law for the court, although the question of whether the allegations are true is an issue for the jury. *Travis v. Dreis & Krump Mfg. Co.*, 453 Mich. 149, 154, 551 N.W.2d 132, 135 (1996). Under Michigan law, an intentional tort for WDCA purposes occurs only when an employee is injured as a result of a deliberate act of the employer, and the employer specifically intended an injury. *Id.* at 169, 551 N.W.2d at 141. An employer is deemed to have intended to injure if he had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. *Id.* at 171, 551 N.W.2d at 142. Knowledge must be actual; constructive, implied, or imputed knowledge is not sufficient. *Id.* at 173, 551 N.W.2d at 143. "A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Id.* at 173-74, 551 N.W.2d at 143.

Here, Brocail pleaded that the Club "had actual knowledge that an injury to Brocail was certain to occur and willfully disregarded that knowledge." In its traditional motion for summary judgment, the Club asserted that the intentional-tort exception did not apply because (a) the Club is not a medical service provider and did not diagnose or operate on

Brocail, (b) the Club had no intention of trading Brocail before the surgery, and (c) a member of the Club's front office is the son of a member of the Astros's front office. None of these grounds defeats or avoids any of the elements of an "intentional tort" as defined by the WDCA.

The Club contends that because Brocail did not attach evidence to his summary judgment response to controvert the Club's evidence, "Brocail failed to raise a genuine issue of material fact regarding his (1) counter-affirmative defense of 'intentional torts' under the Michigan Worker's Disability Compensation Act; (2) his fraud claim; and (3) his vicarious liability and agency claims."[26] In support of this argument, the Club relies on cases addressing counter-defenses that had not been previously asserted by the non-movant. *See, e.g., Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 121 (Tex.1996) (per curiam) (plaintiffs raised affirmative counter-defenses in response to defendant's motion for summary judgment). Here, however, Brocail specifically asserted the counter-defenses at issue. Thus, as the movant, the Club was required to disprove the pleaded counter-defenses in order to establish its entitlement to judgment as a matter of law.

In sum, the Club failed to conclusively disprove the factual allegations made in connection with Brocail's claims of "intentional torts." But although we agree in part with the argument presented in

---

[26] Appellee's Brief, at 9.

Brocail's sixth issue, his "intentional tort" allegations nevertheless fail because they are barred by the Michigan statute of frauds.

C. Michigan Statute of Frauds

In its motion for summary judgment, the Club also argued that Brocail's claims were barred by the Michigan statute of frauds, which provides:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> . . .
>
> (g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. This subdivision does not affect the right to sue for malpractice or negligence.
>
> MICH. COMP. LAWS ANN. § 566.132(1)(g). The statute does not apply solely to a promise to cure, but applies also to a promise to provide medical care with due care or in a non-negligent manner or to any promise relating to medical care.[27]

---

[27] *Smith v. City of Pontiac*, 169 Mich.App. 559, 562, 426 N.W.2d 704, 706 (1988) (per curiam). In *Smith*, the plaintiff

(Continued on following page)

In his Third Amended Petition, Brocail alleged that the Club negligently "represented that Brocail would be as good as new and would pitch again soon for the team if he underwent the treatment by team personnel" but nevertheless failed "to use reasonable care to protect plaintiff's health. . . ." Brocail further alleged that the Club committed fraud and fraudulent concealment by:

> falsely representing that the treatment rendered by team personnel would cure Brocail's injury; falsely representing the nature and outcome of the treatment; falsely representing that the treatment rendered by team personnel was proper and necessary; . . . falsely representing that Brocail would be as

---

brought a wrongful death action against the defendant arising out of a decedent's treatment at the defendant's hospital. *Id.* The plaintiff alleged that the defendant was negligent and breached an implied contract to provide medical services, including express and implied warranties to exercise due care in treating the decedent. *Id.* The court held that the plaintiff's contract claim was invalid because the plaintiff admitted there was no written agreement that met the statute of frauds requirement. *Id.*; *see also Powers v. Peoples Cmty. Hosp. Authority,* 183 Mich.App. 550, 554, 455 N.W.2d 371, 373 (1990) (stating that "the statute requires a writing for any agreement, promise or contract *relating to medical care or treatment* as well as any warranty of cure" and affirming dismissal of plaintiff's contract and promissory estoppel claims) (emphasis added); *Virk v. Detroit Receiving Hosp.,* No. 180621, 1996 WL 33348748, at *1 (Mich.Ct.App. Oct.25, 1996) (per curiam, unpublished) (claimant cannot recover under an alternate theory of promissory estoppel if the claim is barred by section 566.132(1)(g)).

> good as new and would pitch again soon for the team if he had the treatment.

Brocail made similar allegations in connection with his claims of fraudulent inducement, negligent misrepresentation, gross negligence, breach of contract, and promissory estoppel.

These representations all relate to medical care and treatment; thus, the representations are unenforceable in the absence of a writing. *See Powers,* 183 Mich.App. at 554, 455 N.W.2d at 373 (rejecting "plaintiff's promissory estoppel claim as the alleged promise made by defendant hospital's nursing staff related to medical care or treatment and such promises must be in writing"); *see also Malik v. William Beaumont Hosp.*, 168 Mich.App. 159, 171-72, 423 N.W.2d 920, 925 (1988) (per curiam) (applying statute of frauds to claim that hospital falsely represented that kidney transplant would improve quality of life). Consequently, the statute of frauds bars claims that Brocail reasonably relied on the Club's "promise" that he would be cured or would pitch again soon if he submitted to a particular course of medical treatment.[28]

---

[28] Brocail argues that his claims fall within an exception stated in the last sentence of section 566.132(1)(g): "This subdivision does not affect the right to sue for malpractice or negligence." But regardless of whether section 566.132(1)(g) affects the right to sue for malpractice or negligence, the WDCA *does* affect that ability, as discussed *supra*. Because the WDCA bars such suits if brought by an employee against his employer for

(Continued on following page)

The same reasoning applies to Brocail's claims of fraudulent concealment. Fraudulent concealment, also known as fraud by nondisclosure or "silent fraud," cannot occur in the absence of a legal duty of disclosure. *M & D, Inc. v. W.B. McConkey,* 231 Mich.App. 22, 29, 585 N.W.2d 33, 37 (1998). But in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure. *Id.* at 32, 585 N.W.2d at 39. "[T]he touchstone of liability for misdirection or 'silent fraud' is that *some* form of representation has been made and that it was or proved to be false." *Id.* at 30, 585 N.W.2d at 38. Although the misrepresentation may be made through words or conduct,[29] the plaintiff's reliance must have been reasonable.[30] But under Michigan law, such reliance on an unwritten representation could not be considered reasonable in light of the statute of frauds. *See Malik,* 168 Mich.App. at 172-73, 423 N.W.2d at 926 (denying claim for promissory estoppel because "it is common

---

injuries received in the course and scope of his employment, we need not consider whether the statute of frauds acts as an additional bar to those claims. Instead, we need consider the Michigan statute of frauds only in connection with any of Brocail's surviving claims for intentional torts, and the language on which Brocail relies contains no exception for intentional torts.

[29] *Id.* at 33-34, 585 N.W.2d at 40.

[30] *Novak v. Nationwide Mut. Ins. Co.,* 235 Mich.App. 675, 689-91, 599 N.W.2d 546, 553-54 (1999).

knowledge that the results of medical treatment cannot be guaranteed . . . ").

Finally, Brocail argues that this statute applies only to causes of action styled as claims for breach of contract. This argument elevates form over substance: his claim that the Club fraudulently induced him to undergo treatment by misrepresenting that he would be cured is based on a promise of cure, and is therefore barred by the statute of frauds.

We conclude that Michigan's statute of frauds bars Brocail's claims based on representations relating to medical care and treatment. We therefore overrule Brocail's fifth, seventh, and ninth issues.

IV. CONCLUSION

In summary, we overrule Brocail's first issue challenging the specificity of the Club's assertion of the Labor-Management Relations Act as a basis for summary judgment. We further hold that the duty to provide reasonable medical care arises independently from the collective-bargaining agreement. Because that obligation is imposed by the Michigan Workers' Compensation Disability Act, Brocail's claims arising from an alleged breach of the duty to provide reasonable medical care are not preempted by the LMRA. On the other hand, Brocail's claims of fraudulent inducement and failure to provide a proper second opinion are preempted by the LMRA; thus, we overrule Brocail's second and third issues concerning such claims.

Brocail pleaded that those who performed the medical services at issue were "team personnel," Club trainers, agents, or independent contractors under the Club's control. In effect, he complains that his injuries are attributable to a co-employee. Thus, the WDCA is Brocail's exclusive remedy for any injury not caused by an "intentional tort" as that phrase is defined under the Michigan WDCA. Accordingly, we overrule Brocail's fourth and eighth issues. And because claims arising from representations concerning Brocail's medical care and treatment are barred by Michigan's statute of frauds, we overrule his fifth, seventh, and ninth issues.

Finally, although the Club failed to conclusively disprove the factual allegations made in connection with Brocail's "intentional tort" claims, the claims to which Brocail attempted to apply this exception are barred by the LMRA or the Michigan statute of frauds. Thus, we overrule his sixth issue. There being no remaining claims, we affirm the judgment of the trial court.

April 3, 2008

[SEAL]

JUDGMENT

The Fourteenth Court of Appeals

DOUGLAS K. BROCAIL,
Appellant

No. 14-06-00557-CV V.

DETROIT TIGERS, INC.,
Appellee

This cause, an appeal from the judgment in favor for appellee, Detroit Tigers, Inc., signed May 18, 2006, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, Douglas K. Brocail, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

NO. 2002-48741

DOUGLAS K. BROCAIL	IN THE DISTRICT COURT OF
VS.	
DETROIT TIGERS, INC, ET AL	HARRIS COUNTY, TEXAS
	125th JUDICIAL District Courts

ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed May 18, 2006)

The Court, having heard and considered the motion for summary judgment filed by defendant Detroit Tigers, Inc. together with the responses, replies, and arguments of counsel, grants the motion.

It is Ordered that defendant's motion for final summary judgment motion is granted.

Signed: May 18, 2006

/s/ John Coselli
Judge John Coselli

[SEAL]

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

[Names & Phone Numbers Omitted In Printing]

Thursday, May 08, 2008

Bruce E. Ramage
Martin, Disiere, Jefferson & Wisdom, L.L.P.
808 Travis, Suite 1800
Houston, TX 77002

Dale Jefferson
Martin, Disiere, Jefferson Neils Esperson Bldg & Wisdom, L.L.P.
808 Travis, St 1800
Houston, TX 77002

Levon G. Hovnatanian
Martin, Disiere, Jefferson & Wisdom, L.L.P.
808 Travis, Ste 1800
Houston, TX 77002

Michael Jude Lowenberg
The O'Quinn Law Firm
2300 Lyric Centre Building
4400 Louisiana Street
Houston, TX 77002

Thomas W. Pirtle
Laminack, Pirtle & Martines
440 Louisiana, Suite 1250
Houston, TX 77002

Jeffrey Stewart Davis
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007

Peter Scaff
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007

RE: Court of Appeals Number: 14-06-00557-CV
Trial Court Case Number: 2002-48741

Style: Douglas K. Brocail
v.
Detroit Tigers, Inc.

Please be advised that on this date the Court **GRANTED** appellant's(s') motion to extend time to file motion for rehearing in the above cause; time extended to and including **Tuesday, May 19, 2009**.

CHRISTOPHER A. PRINE, CLERK

By _____
Deputy

FOURTEENTH COURT OF APPEALS
[SEAL] 1307 San Jacinto, 11th Floor
Houston, Texas 77002

[POSTMARK Sep. 25, 2008]

RE: Case No. 14-06-00557-CV

Style: Douglas K. Brocail
v. Detroit Tigers, Inc.

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

T. C. Case # 2002-48741 Christopher A. Prine, Clerk

LEVON G. HOVNATANIAN
MARTIN DISIERE JEFFERSON
& WISDOM LLP
808 TRAVIS STE 1800
HOUSTON TX 77002

[SEAL]

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK Jan. 30, 2009]

RE: Case No. 08-0926
COA #: 14-06-00557-CV
Style: DOUGLAS K. BROCAIL
v. DETROIT TIGERS, INC.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:

MR. BRUCE E. RAMAGE
MARTIN DISIERE JEFFERSON
& WISDOM L L P
808 TRAVIS SUITE 1800
HOUSTON TX 77002

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK Mar. 3, 2009]

RE: Case No. 08-0926
COA #: 14-06-00557-CV
STYLE: DOUGLAS K. BROCAIL
v. DETROIT TIGERS, INC.

Today the Supreme Court of Texas granted the motion for extension of time to file motion for rehearing in the above-referenced case. The motion for rehearing was filed in this office on **February 27, 2009**.

MAIL TO:

MR. BRUCE E. RAMAGE
MARTIN DISIERE JEFFERSON
& WISDOM L L P
808 TRAVIS SUITE 1800
HOUSTON TX 77002

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[POSTMARK Apr. 17, 2009]

RE: Case No. 08-0926
COA #: 14-06-00557-CV
STYLE: DOUGLAS K. BROCAIL
v. DETROIT TIGERS, INC.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MR. BRUCE E. RAMAGE
MARTIN DISIERE JEFFERSON
& WISDOM L L P
808 TRAVIS SUITE 1800
HOUSTON TX 77002

29 U.S.C.A. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of

the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

M.C.L.A. 418.315. Medical care; fees; advisory committee; investigations; utilization review

Sec. 315. (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, MCL 333.17401, as of May 20, 1992. An employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reasons for

the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

(2) Except as otherwise provided in subsection (1), all fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), are subject to rules promulgated by the bureau of worker's compensation pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The rules promulgated shall establish schedules of maximum charges for the treatment or attendance, service, devices, apparatus,

or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less.

(3) The director of the bureau shall provide for an advisory committee to aid and assist in establishing the schedules of maximum charges under subsection (2) for charges or fees that are payable under this section. The advisory committee shall be appointed by and serve at the pleasure of the director.

(4) If a carrier determines that a health facility or health care provider has made any excessive charges or required unjustified treatment, hospitalization, or visits, the health facility or health care provider shall not receive payment under this chapter from the carrier for the excessive fees or unjustified treatment, hospitalization, or visits, and is liable to return to the carrier the fees or charges already collected. The bureau may review the records and medical bills of a health facility or health care provider determined by a carrier to not be in compliance with the schedule of charges or to be requiring unjustified treatment, hospitalization, or office visits.

(5) As used in this section, "utilization review" means the initial evaluation by a carrier of the appropriateness in terms of both the level and the quality of health care and health services provided an injured employee, based on medically accepted standards. A

utilization review shall be accomplished by a carrier pursuant to a system established by the bureau that identifies the utilization of health care and health services above the usual range of utilization for the health care and health services based on medically accepted standards and provides for acquiring necessary records, medical bills, and other information concerning the health care or health services.

(6) By accepting payment under this chapter, a health facility or health care provider shall be considered to have consented to submitting necessary records and other information concerning health care or health services provided for utilization review pursuant to this section. The health facilities and health care providers shall be considered to have agreed to comply with any decision of the bureau pursuant to subsection (7). A health facility or health care provider that submits false or misleading records or other information to a carrier or the bureau is guilty of a misdemeanor, punishable by a fine of not more than $1,000.00, or by imprisonment for not more than 1 year, or both.

(7) If it is determined by a carrier that a health facility or health care provider improperly overutilized or otherwise rendered or ordered inappropriate health care or health services, or that the cost of the health care or health services was inappropriate, the health facility or health care provider may appeal to the bureau regarding that determination pursuant to procedures provided for under the system of utilization review.

(8) The criteria or standards established for the utilization review shall be established by rules promulgated by the bureau. A carrier that complies with the criteria or standards as determined by the bureau shall be certified by the department.

(9) If a health facility or health care provider provides health care or a health service that is not usually associated with, is longer in duration in time than, is more frequent than, or extends over a greater number of days than that health care or service usually does with the diagnosis or condition for which the patient is being treated, the health facility or health care provider may be required by the carrier to explain the necessity or indication for the reasons why in writing.

CAUSE NO. 2002-48741

DOUGLAS K. BROCAIL	§	IN THE DISTRICT COURT
	§	OF
VS	§	HARRIS COUNTY, TEXAS
	§	
DETROIT TIGERS, INC.	§	125TH JUDICIAL DISTRICT

DETROIT TIGERS, INC.'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Jun. 29, 2005)

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

By: /s/ Peter Scaff

Jeffrey S. Davis
State Bar No. 00783936
Peter Scaff
State Bar No. 24027837
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
(713) 276-5500
(713) 276-5555 (Fax)
ATTORNEYS FOR DEFENDANT, DETROIT TIGERS, INC.

* * *

[16] **V. Argument & Authorities**

A. Brocail's Claims are Preempted and Barred by Federal Labor Law.

1. Brocail's Claims are Preempted by Section 301.

35. Although Brocail pleads his claims as state law claims, these allegations must be treated as federal labor law claims under Section 301 of the Labor Management Relations Act [17] (the "LMRA"), codified at 29 U.S.C. §§141-87. Section 307[70] provides the exclusive remedy for individual employees asserting claims against an employer that implicate a collective bargaining agreement. *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994); *Landry v. Cooper/T. Smith Stevedoring Co., Inc.*, 880 F.2d 846, 850 (5th Cir. 1989). If applicable, Section 301 "preempts" state law claims in that "only the federal law fashioned by the courts under section 301 governs the interpretation and application of collective bargaining agreements." *Sherwin v. Indianapolis Colts, Inc.*, 752 F.Supp. 1172, 1176-77 (N.D. New York 1990). **The preemptive**

---

[70] Section 301 of the LMRA provides, in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a).

effect of section 301 applies to causes of action arising in both contract and tort. *Id.* at 1177 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985)).

36. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must be either treated as a § 301(a) claim or dismissed as pre-empted by federal labor-contract law," *Sherwin*, 752 F.Supp. at 1177 (citing *Allis-Chalmers*, 471 U.S. at 213). "The test to be used in applying [whether a case is a section 301 claim] is to determine if "the *duty to the employee* of which the tort is a violation is created by a collective-bargaining agreement and *without existence independent of the agreement.*" *Sherwin*, 752 F.Supp. at 1177 (emphases in original) (citations omitted). "In order to be independent of the collective bargaining agreement, . . . a tort claim must allege a violation owed to every person in society, as opposed to a duty owed only to employees covered by the collective bargaining agreement." *Id.* (internal quotations and citations omitted). When the duty the plaintiff claims the employer violated arises out of the CBA, the claim is preempted. *Id.*; *see also, e.g., LTV Corp.*, 39 F.3d at 619 (tort claims [18] preempted because "[t]o determine whether LTV's conduct was wrongful under the circumstances, an analysis of the collective-bargaining agreement is necessary"); *Burgos v. Southwestern Bell*, 20 F.3d 633 (5th Cir. 1994) (intentional infliction of emotional distress claim based on harsh treatment

of employee notwithstanding knowledge of medical condition preempted because an analysis of the CBA was necessary to determine the employer's obligations under the CBA to determine if it acted wrongfully); *Barrow v. New Orleans Steamship Ass'n,* 932 F.2d 473, 480 (5th Cir. 1991) (employee claimed new seniority system was discriminatory because it was inconsistent with the employer's obligations under the CBA).

37. Unquestionably, the allegations contained Brocail's recently-filed live pleading implicate the CBA, as shown by the following examples:

1. The Tigers monitored Brocail's health, physical condition, conditioning and well being, the need for medical care and treatment, and the propriety of diagnoses rendered and treatments recommended by the team personnel and their affects on Brocail's health and performance.

2. The Tigers required Brocail to adhere to training rules and regimens that directly affected his health, physical condition, and well being.

3. The Tigers required Brocail to seek treatment from team personnel it designated at the Detroit Tigers' offices.

4. The Tigers encouraged or directed Brocail to undergo the treatment from team personnel, and that he underwent the treatment and rehabilitation and completed

all parts of such at the direction of team personnel.

5. The Tigers have a duty of reasonable disclosure of the available choices with respect to the proposed therapy and of the dangers that are inherently and potentially involved in each procedure to Plaintiff.

6. The Tigers must disclose all information that is necessary to make a knowledgeable decision about any proposed treatment, a duty which is imposed so that the plaintiff can meaningfully exercise his right to make decisions that affect him.

7. The Tigers failed to act with the skill and knowledge that would be utilized by other members of the profession acting in similar circumstances.

8. The Tigers did not provide a proper second medical opinion before encouraging, endorsing and/or directing that Brocail undergo treatment

9. The Tigers did not seek a determination of the proper and effective treatment from a physician that possessed the necessary expertise, skill, training, experience, ability, competence, and/or knowledge.

[19] 10. The Tigers did not designate team personnel that could properly diagnose and treat the injury.

11. The Tigers encouraged and/or directed Brocail to undergo improper treatment and/or failed to establish policies and procedures for the treatment of its players.

12. The Tigers failed to follow team physician's orders.

13. The Tigers failed to use reasonable care with plaintiff; failed to use reasonable care to protect plaintiff's health and investment; failed to fully advise of the adverse effects of continued medical and rehab treatment and the continuation in playing baseball under the then present condition of plaintiff; failed to advise plaintiff of all options concerning his condition, and associated treatments, if any, to continue playing baseball; failed to perform the appropriate examinations, including pre-participation or qualifying status to identify future risk of injury, to determine plaintiff's fitness to participate and/or continue to participate in baseball, to prevent subsequent injury, and to assess his rehabilitative status; failed to advise the Houston Astros of the true extent of Plaintiff's condition to play baseball and/or failed to advise the team physicians of Brocail's medical condition.

14. The Tigers negligently hired team personnel.

15. The Tigers have a nondelegable duty to provide appropriate team personnel to Plaintiff, perform its contracts with care, skill, reasonable expedience and faithfulness with regard to Plaintiff, avoid harm by the negligence of an independent contractor.

16. The Tigers breached a contractual duty to ensure that the team personnel it required Brocail to seek treatment from possessed the necessary expertise, skill, training, experience, ability, competence and/or knowledge to property diagnose and treat the particular injury that Brocail sustained.

17. The Tigers breached a non-delegable duty to perform its contracts with care, skill, reasonable expedience and faithfulness with regard to Plaintiff.

18. The Tigers are vicariously liable because it breached a non-delegable duty to provide appropriate team personnel to plaintiff.

38. No serious argument can be made that these duties are ones that the Tigers would owe to "every person in society." Assuming (for summary judgment purposes only) that these various permutations of tort and contract duty existed from the Tigers to Brocail, the only conceivable basis for determining such, and for determining the scope thereof, is the

CBA, the UPC and the Regulations.[71] Lest there be any doubt, Brocail's own expert's report confirms the source of the alleged duties:

> [20] Read together, the Collective Bargaining Agreement, the UPC, and the Regulations establish that a Major League club, such as the Detroit Tigers, effectively has a non-delegable duty to provide reasonable and appropriate medical care to its players, including an obligation to provide proper treatment and rehabilitation for their injuries.[72]

Without reference to and reliance on the CBA, the UPC and the Regulations, the Tigers would have no

---

[71] The UPC is derived from the CBA and references the CBA on fifteen occasions. Exhibit A, AA. To the extent Brocail relies upon the UPC as the source of any duties, the UPC confers and has the same preemptive effect as the CBA. *LTV Corp.*, 39 F.3d at 617-18; *see also Eitmann v. New Orleans Public Serv., Inc.*, 730 F.2d 359, 362, 364 (5th Cir. 1984) (union employee's claim for breach of a separate individual employment contract analyzed for LMRA preemption purposes just as a CBA because the two agreements could not be construed independently of each other as the CBA controls where inconsistencies exist) (citing *J.I. Case v. NLRB*, 321 U.S. 332 (1944)); *Stallcop v. Kaiser Foundation Hosp.*, 820 F.2d 1044, 1048 (9th Cir. 1987) (a separate agreement of employment is treated as a CBA for preemption purposes because the independent agreement can only be effective as part of the larger CBA).

[72] Exhibit BB. The Tigers offer Mitten's expert report in this summary judgment proceeding for the limited purpose of showing the nature of Brocail's allegations. The Tigers reserve the right to object to his opinion and testimony in a subsequent hearing and/or trial.

duty or obligation to provide *any* medical services to Brocail. Because Brocail's claims implicate the CBA, the UPC and the Regulations, they are preempted and thus governed by Section 301 of the LMRA.

* * *

NO. 2002-48741

DOUGLAS K. BROCAIL	§	IN THE DISTRICT
	§	COURT OF
V.	§	
	§	HARRIS COUNTY,
DETROIT TIGERS, INC.	§	TEXAS
	§	
	§	125th JUDICIAL
	§	DISTRICT

PLAINTIFF DOUGLAS K. BROCAIL'S RESPONSE TO DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Aug. 12, 2005)

* * *

[7] **II. BROCAIL'S CLAIMS ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT**

Contrary to the Tigers' assertion, the Federal Labor Management Relations Act does not preempt every state-law claim that arises from employment that is governed by a CBA. Instead, only claims that require the interpretation of a CBA's provisions are preempted. The Tigers' motion should be denied because the source of the requirement that the Tigers provide reasonable medical services to Brocail was not the CBA or UPA, the resolution of Brocail's common-law tort claims do not require the interpretation of the CBA or the UPA, and Brocail's allegations present only factual questions about the Tigers' conduct and motives.

A. Preemption under the LMRA applies only to claims whose resolution depends on the interpretation of the CBA.

The United States Supreme Court has repeatedly held that "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 [of the Labor Management Relations Act]. . . ." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 n.12 (1994) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)). Instead, preemption is limited only to claims that "depend[ ] upon the meaning of a collective-bargaining agreement. . . ." *Id.* at 405-06. In other words, preemption does not apply if the "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407.

[8] "'[P]urely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement." *Hawaiian Airlines, Inc. v. Finazzo*, 512 U.S. 246, 261 (1994) (quoting *Lingle*, 486 U.S. at 407). "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself the claim is 'independent' of the agreement for § 301 preemption purposes." *Finazzo*, 512 U.S. at 262 (quoting *Lingle*,

486 U.S. at 409-410). As shown below, the resolution of Brocail's tort claims does not even tangentially involve a provision of the CBA and UPA.

B. The Source of The Requirement That the Tigers Provide Reasonable Medical Services was the MWDCA, not the CBA and UPA.

The Tigers conveniently ignore that the requirement to provide Brocail with reasonable medical services was imposed by statute, not the CBA or UPA. The MWDCA provides

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

MICH. COMP. LAWS ANN. § 315(1). No similar provision is found in the CBA or UPA. Even if the Tigers had employed Brocail without the CBA or UPA, they would have been obligated to provide him with reasonable medical services for injuries he sustained within the course and scope of his employment.

The term "reasonable medical, surgical, and hospital services" is found nowhere in the CBA or UPA. Moreover, the source of the duties for Brocail's tort claims is state [9] law, not the CBA or UPA. Thus,

the requirement that the Tigers provide reasonable medical services is wholly independent of the CBA or UPA.

C. The Resolution of Brocail's Claims Does Not Require The Interpretation Of The CBA or UPA.

While the Tigers pay lip service to the LMRA's preemption standard, they fail to identify a single provision of the CBA or UPA that must be interpreted to resolve Brocail's tort claims. For example, there is no provision in the CBA or UPA that resolves the claims based on the Tigers' false representations that Brocail would be pitching for the team soon and Brocail's detrimental reliance on them. Similarly, neither the CBA nor UPA need to be interpreted to resolve Brocail's allegations that the Tigers' made false representations that Brocail would be as good as new after the treatment, that Brocail detrimentally relied on them, and was injured. The same is true for Brocail's other allegations and claims. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 992 (9th Cir. 2001) (holding that the player's interference with contract and business relations claim was not preempted to the extent it was based on the violation of state law and was preempted to the extent it was based on violations of the CBA).

Significantly, the primary authority relied upon by the Tigers, *Sherwin v. Indianapolis Colts*, 752 F.Supp. 1172, 1176-77 (N.D. New York 1990),

confirms that the resolution of Brocail's claims do not require any interpretation of the CBA or UPA. There, the CBA gave the team physician the discretion to determine what medical care was necessary. It placed the medical care that the player was entitled to receive entirely within the discretion of the team's physician: "'[i]f Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this [10] contract ***as the Club physician may deem necessary***. . . .'" *Id.* at 1174 (emphasis added). The CBA also addressed the player's right to receive information from the team regarding his medical condition: "'[i]f a Club physician advises a coach or other Club representative of a player's physical condition which could adversely affect the player's performance or health, the physician will also advise the player. . . .'" *Id.* The player asserted that the team and its physicians did not provide adequate medical care and withheld information regarding the true nature of his injury. *Id.* at 1173.

The team contended that their duty to provide medical care and information to the player arose exclusively from the CBA and that the resolution of the player's claims was substantially dependent on the CBA's interpretation. *Id.* at 1175. Because interpreting the CBA was necessary, it argued, the plaintiff's claims were subject to the mandatory

grievance and arbitration procedure contained in the CBA, which the player had not followed. *Id.*

The District Court agreed. It first noted that the team had no duty to provide medical care outside the CBA and UPA: "The Colts did not owe a duty to provide medical care to the plaintiff independent of the relationship established in the agreements." *Id.* at 1178. It concluded that whether the team had provided adequate medical care and fulfilled its duty to disclose information could not be resolved without interpreting the CBA and UPA:

> The court cannot resolve plaintiff's claims based on inadequate medical care without interpreting the clauses establishing those duties in the agreements. In addition, the court cannot resolve plaintiff's fraud and negligent misrepresentation claims without reference to Article XXXI, section 1 of the CBA, which establishes the duty of a club physician, and arguably the club, to inform a player of physical conditions "which could adversely affect the player's performance or health."

[11] *Id.* at 1178.

Here, the requirement that the Tigers provide reasonable medical services to Brocail existed independent of the CBA and UPA under the MWDCA. Neither the CBA or UPA provide the Tigers, their physicians, or employees with the discretion to determine what medical care was "necessary" for the treatment of Brocail's injury. *Id.* at 1174. Additionally,

neither the CBA nor UPA addresses the disclosure of medical information by its team physicians or employees to Brocail. Nor does it address any obligation by Tiger employees, such as team trainers, to provide medical services or information to players.

Instead, the CBA and UPA only mention the reimbursement of "medical and hospital expenses incurred." Specifically, the regulations attached to the UPA provide that the player's disability is not a bar to the reimbursement of medical expenses: "[d]isability directly resulting from injury sustained in the course and within the scope of his employment under this contract shall not impair the right of the Player to receive his full salary . . . together with the ***reasonable medical and hospital expenses incurred*** by reason of the injury. . . ." MSJ, exhibit A, DT 853 at para. 2 (emphasis added).

As shown above, the requirement to provide "reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed" is imposed outside the CBA and UPA by the MWDCA. The Tigers had to satisfy this requirement for any member of the public whom they hired as an employee. Thus, the construction of the CBA or UPA is unnecessary to resolve Brocail's tort claims and he was not required to follow the grievance procedure contained therein.

[12] Likewise, the other authorities on which the Tigers rely clearly confirm that preemption does not

apply here. In *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633 (5th Cir. 1994), the plaintiff alleged that an employer inflicted emotional distress upon the decedent by repeatedly and wrongfully transferring him to different jobs, which caused him to quit. However, the employer's right to transfer employees among various positions was governed by the CBA's procedures for work-force adjustments. *Id.* The court held that the claim was preempted because an analysis of the CBA was necessary to determine whether the employer acted wrongfully in the way it transferred the decedent, required him to take different tests, and effected the decedent's termination. *Id.* at 636.

In *Thomas v. LTV Corporation*, 39 F.3d 611 (5th Cir. 1994) the issue was whether a claim arising out of an agreement ancillary to a CBA was preempted. The employee had excessive attendance problems. *Id.* at 614. The governing CBA contained grievance and arbitration procedures for disciplinary actions and the interpretation and application of the agreement. *Id.*

As a condition of his continued employment, the employee was required to sign an attendance probation agreement. ("APA"). *Id.* It provided that his absences could not exceed four percent of his scheduled work time within any three-month period and that any unexcused absences would result in his immediate termination without resort to the CBA's grievance procedures. *Id.* The employee signed the

agreement, which was also approved by the union steward. *Id.*

Subsequently, the employee sustained an on the job injury that caused him to be absent in excess of the minimum requirements of the APA. *Id.* at 614-15. After determining that the APA had been violated, the employer terminated him.

[13] The employee filed suit alleging breach of contract, promissory estoppel, intentional and negligent infliction of emotional distress, and a claim under the Texas Labor Code for wrongful discharge in retaliation for filing a workers' compensation claim. *Id.* at 615. The trial court ruled that the claims were preempted.

The court of appeals concluded that the APA was tantamount to a CBA. *Id.* at 618. The breach-of-contract and estoppel claims were based on the interpretation of the method for calculating absences specified in the APA. *Id.* Consequently, the claims were substantially dependent on the terms of the APA and preempted.

The court also held that the claim for infliction of emotional distress was preempted. One of the elements of the employee's claim was that the employer's conduct was wrongful. *Id.* at 619. However, the propriety of the employer's conduct necessitated an analysis of the disciplinary procedures in of the CBA. Again the claim was substantially dependent on the CBA and was preempted. *Id.*

Significantly, the court recognized that a claim based on the state statutory prohibition against firing a worker in retaliation for filing a worker's compensation claim was not preempted. *Id.* at 620. However, the court emphasized that the employee steadfastly maintained that his wrongful discharge claim was based solely on the interpretation of the four percent provision contained in the APA. *Id.* at 621. Thus, the wrongful discharge claim was based solely on the interpretation of the CBA and was preempted. *Id.* Here, Brocail has not asserted an interpretation or misinterpretation of the CBA or UPA to support his claims as the employee did in *Thomas*.

In *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 851 (5th Cir. 1989), preemption was not an issue. The court identified the controlling issue as whether [14] the labor union had violated its duty of fair representation to the plaintiff employee. The court held that there was no evidence that the union had breached its duty. *Id.* at 855. In other words, the plaintiff merely failed to sustain his burden of proof. The claim was not preempted.

Similarly, in *Barrow v. New Orleans Steamship Association*, 932 F.2d 473 (5th Cir. 1991), preemption was not an issue. Instead, the court held that the employee's claims asserting age discrimination under the Americans with Disabilities Act and breach of contract were time barred, that his claim of retaliation should not have been dismissed with prejudice for not first filing it with the EEOC, and that his claim for emotional distress was improperly

dismissed as being time barred. *Id.* at 478. Preemption and the LMRA were not even mentioned.

D. Brocail's Claims Involve Only Factual Questions About The Conduct And Motives Of The Tigers.

Further confirming that interpretation of the CBA and UPA is unnecessary is the nature of Brocail's allegations, which present only factual issues pertaining to the Tigers' conduct and motives. For example, whether the Tigers failed to follow physicians' orders is a fact issue pertaining to their conduct. Whether the Tigers failed to designate team personnel that could properly monitor, diagnose, and treat Brocail's condition is another. The Tigers identify no provision in the CBA or UPA that must be interpreted to resolve the factual issues they identify in their motion. At best, the Tigers can only claim that the various fact issues "implicate" the CBA. MSJ at ¶ 37. Yet, mere implication is insufficient. *Lingle*, 466 U.S. at 413 R. 12 (stating that disputes tangentially involving a provision of a CBA are not preempted). Because the Tigers have [15] failed to sustain their burden to show that they are entitled to judgment as a matter of law, their motion should be denied.

* * *

No. 14-06-00557-CV

IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS

Douglas K. Brocail,
Appellant

v.

Detroit Tigers, Inc.,
Appellee

On Appeal from Trial Court Cause No. 2002-48741
In the 125th Judicial District Court
Harris County, Texas

APPELLANT'S BRIEF

Bruce E. Ramage
State Bar No. 16492500
Levon G. Hovnatanian
State Bar No. 10059825
Dale Jefferson
State Bar No. 10607900
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0102 – Facsimile

Thomas W. Pirtle
State Bar No. 16038610
LAMINACK, PIRTLE
& MARTINES
440 Louisiana, Suite 1250
Houston, Texas 77002
(713) 292-2750 – Telephone
(713) 292-2755 – Facsimile

Michael Lowenberg
State Bar No. 24001164
The O'Quinn Law Firm
2300 Lyric Centre Building
440 Louisiana Street
Houston, Texas 77002
(713) 223-1000 – Telephone
(713) 222-6903 – Facsimile

ORAL ARGUMENT REQUESTED

* * *

[4] **ARGUMENT**

I. BROCAIL'S CLAIMS ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

The Labor Management Relations Act does not preempt every state-law claim that is related to employment that is governed by a CBA. Instead, only claims that require the interpretation of a CBA's provisions are preempted. The summary judgment should be reversed because the resolution of Brocail's common-law claims do not require the interpretation of the CBA or the UPC and Brocail's allegations present only factual questions about the Tigers' conduct and motives.

A. Preemption Under The Labor Management Relations Act Applies Only To Claims Whose Resolution Depends On The Interpretation Of The CBA.

The United States Supreme Court has repeatedly held that not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is preempted by § [5] 301 [of the Labor Management Relations Act]. . . ." *Lingle v. Norge Div. of Magic Chef Inc.*, 486 U.S. 399, 413 n.12 (1994) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)). Instead, preemption is limited only to claims that "depend[ ] upon the meaning of a collective-bargaining agreement. . . ." *Id.* at 405-06. In other words, there is no preemption if the "resolution of the state-law claim

does not require construing the collective-bargaining agreement." *Id.* at 407. However, the court's examination of a CBA to determine the preemption issue is not tantamount to interpreting the CBA. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1991).

"'[P]urely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement." *Hawaiian Airlines, Inc. v. Finazzo*, 512 U.S. 246, 261 (1994) (quoting *Lingle*, 486 U.S. at 407). "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Id.* at 262 (quoting *Lingle*, 486 U.S. at 409-410). As shown below, the Tigers never showed in their motion for summary judgment that the resolution of Brocail's tort claims required the interpretation of any part of the CBA or UPC.

B. In Order To Establish Preemption, The Tigers Were Required To Show That The Interpretation Of Specific Provisions Of The CBA Or UPC Was Necessary To Resolve Brocail's Tort Claims.

The Tigers' motion for summary judgment was based on a false assumption. They erroneously asserted:

> [6] Without reference to and reliance on the CBA, the UPC and the Regulations, the Tigers would have no duty or obligation to provide *any* medical services to Brocail. Because Brocail's claims implicate the CBA, the UPC and the Regulations, they are preempted and thus governed by Section 301 of the LMRA.

R. 110. As shown below, the Tigers' own general counsel, John Westhoff, refuted that the CBA or UPC obligated the Tigers to provide reasonable medical services to Brocail. Moreover, "implication" of the CBA and UPC is an insufficient basis for preemption.

1. The opinions on which the Tigers relied identified a specific provision of the CBA or ancillary agreement as the basis for preemption.

The opinions on which the Tigers relied confirm that preemption must be established by identifying a specific part of the CBA or UPC that must be interpreted to resolve Brocail's tort claims. In *International Brotherhood of Electrical Workers v. Heckler*,

481 U.S. 851 (1987), the Court dealt with a situation far removed from the one here, but still based its preemption holding on a specific CBA provision. There, the employee attempted to take advantage of Florida law's recognition that the violation of a contract permitted the plaintiff to file either an action for breach of contract or a tort action for the injuries sustained as a result of a contract violation. *Id.* at 860. The contract was a CBA and ancillary agreements. *Id.* at 861. The employee asserted that her ***union***, not her employer, had breached a duty.

As the Court emphasized, the employee actually pled that the tort duty that was the basis of her claim was created by the CBA and the agreements:

> She asserts that "pursuant to contracts and agreements" between the Union and [the employer], "to which contracts and agreements the Plaintiff was a third party beneficiary," the Union owed respondent a duty of care to [7] ensure her a safe working environment. ***Having assumed this duty under the collective bargaining agreement***, the Union – ***according to the complaint*** – was then negligent by allowing [the Plaintiff] to be assigned to work in . . . a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background, and education to work in such a dangerous environment," and was further negligent in failing to "provid[e] and/or enforc[e] safety rules, regulations and

> requirements which would preclude such persons with inadequate and insufficient background, training, education, and experience, such as the Plaintiff, . . . from being placed in such an inherently dangerous working environment."

Id. at 861 (emphasis added). The employee had even conceded that "'[t]he nature and scope of the duty of care owed Plaintiff is determined by reference to the collective bargaining agreement.'" *Id.* at 862 n.5.

The CBA and ancillary agreements between the union and the employer contained provisions governing safety and working requirements. Specifically, the CBA imposed upon the union the requirement that "no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers." *Id.* at 861 n.4. It also required a joint safety commission to develop effective safety programs for all employees. *Id.* In order for the employee's claim to be successful, these provisions and others had to be interpreted to impose an implied duty on the union and to determine the scope of that duty. *Id.* Because her tort allegations were entirely dependent on the breach of a duty that could be derived only from the interpretation of the terms of the CBA and its ancillary agreements, the claim was preempted. *Id.*

The Court in *United Steel Workers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990), another opinion on which the Tigers relied, also based

its preemption [8] holding on specific provisions of the CBA or ancillary agreement that had to be interpreted to resolve the employee's claims. There, the survivors of miners' who were killed during a mine fire asserted a state-law claim against the miners' union for the negligent inspection of the mine. *Id.* at 364. Again, the allegations were based on the failure to properly perform duties created by the CBA:

> [T]he Union "undertook to act as accident prevention representative and ***enforcer of an agreement negotiated between [sic] [the Union] on behalf of the deceased miners***," and "undertook to provide representatives who inspected [the Sunshine Mine] and pretended to enforce the contractual accident prevention clauses."

Id. at 365 (emphasis added) (citations omitted) (quoting the complaint). The Court observed that the quoted, emphasized, allegation was "a plain reference to the collective-bargaining agreement with the operator of the Sunshine Mine." *Id.* at 369-70. The Court observed that there was no question that the plaintiffs alleged a duty created by the CBA as the basis for their tort claim:

> The only possible interpretation of these pleadings, we believe, is that the duty on which respondents relied as the basis of their tort suit ***was one allegedly assumed by the Union in the collective bargaining agreement***.

Id. at 370 (emphasis added). The court further emphasized that the survivors had merely alleged the breach of the CBA:

> If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners.

Id. at 371. The Court then made it absolutely clear that the claim was preempted because it was based on a contractual duty found in the CBA:

> [9] Preemption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort.

Id. at 371-72. Once again, preemption was based on a specific provision in the CBA that created the duty that was the basis for the tort claim. None of Brocail's claims is based on a duty created by the CBA or UPC.

Likewise, the other authorities on which the Tigers rely clearly confirm that preemption applies only when it is shown that a specific provision of the CBA must be interpreted. In *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633 (5th Cir. 1994), the plaintiff alleged that an employer inflicted emotional distress upon the decedent by repeatedly and wrongfully transferring him to different jobs, which caused him to quit. However, the employer's right to transfer

employees among various positions was governed by the CBA's written procedures for work-force adjustments. *Id.* The court held that the claim was preempted because an analysis of the CBA was necessary to determine whether the employer acted wrongfully in the way it transferred the decedent, required him to take different tests, and effected the decedent's termination. *Id.* at 636.

In *Thomas v. LTV Corporation*, 39 F.3d 611 (5th Cir. 1994), the issue was whether a claim arising out of an agreement ancillary to a CBA was preempted. The employee had excessive attendance problems. *Id.* at 614. The governing CBA contained grievance and arbitration procedures for disciplinary actions and the interpretation and application of the agreement. *Id.*

[10] As a condition of his continued employment, the employee was required to sign an attendance probation agreement ("APA"). *Id.* It provided that his absences could not exceed four percent of his scheduled work time within any three-month period and that any unexcused absences would result in his immediate termination without resort to the CBA's grievance procedures. *Id.* The employee signed the agreement, which was also approved by the union steward. *Id.*

Subsequently, the employee sustained an on-the-job injury that caused him to be absent in excess of the minimum requirements of the APA. *Id.* at 614-15. After determining that the APA had been violated,

the employer terminated him. The employee filed suit alleging breach of contract, promissory estoppel, intentional and negligent infliction of emotional distress, and a claim under the Texas Labor Code for wrongful discharge in retaliation for filing a workers' compensation claim. *Id.* at 615.

The court concluded that the APA was tantamount to a CBA. *Id.* at 618. The breach-of-contract and estoppel claims were based on the interpretation of the method for calculating absences specified in provisions found in the CBA. *Id.* Consequently, the resolution of the claims was substantially dependent on the terms of the CBA and preempted.

The court also held that the claim for infliction of emotional distress was preempted. One of the elements of the employee's claim was that the employer's conduct was wrongful. *Id.* at 619. However, the propriety of the employer's conduct necessitated an analysis of the disciplinary procedures found in provisions of the CBA. Again the claim was substantially dependent on the CBA and was preempted. *Id.*

[11] Significantly, the court recognized that a claim based on the state statutory prohibition against firing a worker in retaliation for filing a worker's compensation claim was not preempted. *Id.* at 620. However, the court emphasized that the employee steadfastly maintained that his wrongful discharge claim was based solely on the four-percent provision contained in the CBA. *Id.* at 621. Thus, the wrongful

discharge claim was based solely on the interpretation of a provision of the CBA and was preempted. *Id.*

In *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 851 (5th Cir. 1989), preemption was not even an issue. The court identified the controlling issue as whether the labor union had violated its duty of fair representation to the plaintiff employee. The court held that there was no evidence that the union had breached its duty. *Id.* at 855. In other words, the plaintiff had merely failed to sustain his burden of proof. The claim was not preempted.

Similarly, in *Barrow v. New Orleans Steamship Association*, 932 F.2d 473 (5th Cir. 1991), preemption was not an issue. Instead, the court held that the employee's claims asserting age discrimination under the Americans with Disabilities Act and breach of contract were time barred, that his claim of retaliation should not have been dismissed with prejudice for not first filing it with the EEOC, and that his claim for emotional distress was improperly dismissed as being time barred. *Id.* at 478. Preemption and the LMRA were not even mentioned.

* * *

[14] **C. In Any Event, The Resolution Of Brocail's Claims Does Not Require The Interpretation Of The CBA Or UPC.**

1. The CBA and UPC do not impose upon the Tigers a duty to provide medical services that preempts all treatment-related claims.

The Tigers conveniently ignore that the requirement to provide Brocail with reasonable medical services was not imposed by the CBA or UPC. Instead, the duty was imposed by state law. The MWDCA provides:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

[15] MICH. COMP. LAWS ANN. § 418.315(1). No similar provision is found in the CBA or UPC. In fact, the term "reasonable medical services" is found nowhere in the CBA or UPC. R. 134-49, 509-601, 703. Even if the Tigers had employed Brocail without the CBA or UPC, they would have been obligated to provide him with reasonable medical services for injuries he sustained within the course and scope of his employment. *Id.*

The Tigers' own general counsel, John Westoff, confirmed that no provision in the CBA or UPC imposed a duty on the Tigers to provide medical care to Brocail. He stated that the CBA did not obligate the Tigers to provide Brocail with medical care: "but there is no provision in the Collective Bargaining Agreement that provides that the employer must provide all reasonable medical care or whatever." R. 703. He acknowledged that the duty arose solely under the MWDCA:

> Q. Well, do you agree that as a subscriber to workers' comp that the Detroit Tigers owed a duty to Doug Brocail to furnish him reasonable medical, surgical and hospital services as a result of the injury that he sustained in the course and scope of his employment?
>
> A. ***I don't agree that it is a right that flows from the Collective Bargaining Agreement,*** but, you know, this is a provision of the Michigan State Workers' Comp Act. So we're subscribers to that act and we should follow the dictates of that act.

R. 703. (emphasis added) (objection omitted). Westhoff also acknowledged that the CBA did not require the Tigers to be a workers' compensation subscriber nor did they strike an agreement with Brocail to provide workers compensation benefits. R. 692, 700, 731, 740. Westhoff then inexplicably claimed that Brocail was required to file a grievance on issues to assert a right that neither the CBA nor UPC provided or addressed:

> [16] Q. Okay. And I agree with you that the Collective Bargaining Agreement does mention the expenses associated with medical services. But would you agree with me that the Collective Bargaining Agreement does not refer to the supplying of reasonable medical, surgical and hospital services?
>
> A. There's – there's obviously – there is no explicit provision. But obviously, with a very broad definition of grievance in – in the agreement, if Mr. Brocail believed that right existed, he could have filed a grievance to have an arbitrator interpret that. ***But there's no specific provision as you just stated.***

R. 703 (emphasis added). However, Brocail never claimed that this right was provided under the CBA or UPC, and Westhoff agrees that no such right is provided. R. 703.

Moreover, the purportedly broad definition of "grievance" does not encompass Brocail's claims. The CBA defines "grievance" as "a complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association and the Clubs or any of them, or between a Player and a Club. . . ." R. 528 at p. 28, article XI, A(1)(a). That is consistent with the preemption standard adopted by the Supreme Court, which provides that if a state-law claim does not require construing the collective bargaining agreement, preemption does not apply. *Lingle*, 486 U.S. at 405-06. Preemption applies only to claims

that "depend[] upon the meaning of a collective-bargaining agreement. . . ." *Id.* Because Brocail's claims do not involve the interpretation of, or compliance with, the specified agreements or provisions, Brocail was not required to follow the CBA's grievance procedure, nor did its limitations period apply.

By Westhoff's own admission, neither the CBA nor UPC imposed a duty on the Tigers to provide reasonable medical care, nor did he identify any provision that [17] governed the Tigers' representations about the propriety of any potential medical care. As shown below, Brocail's claims do not involve the existence or interpretation of, or compliance with, any provision of the CBA or UPC and preemption does not apply. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 992 (9th Cir. 2001) (holding that the player's interference with contract and business relations claim was not preempted to the extent it was based on the violation of state law and was preempted to the extent it was based on violations of the CBA); *Voilas v. General Motors Corp.*, 170 F.3d 367, 372-78 (3d Cir. 1999) (holding that plaintiffs' common-law fraud claims did not require the interpretation of the CBA and were not preempted under the LMRA).

2. The CBA and UPC govern only the reimbursement of medical expenses and physician selection and need not be interpreted to resolve Brocail's claims.

No part of the CBA or UPC needs to be interpreted to resolve Brocail's claims. The primary authority relied upon by the Tigers, *Sherwin v. Indianapolis Colts*, 752 F.Supp. 1172, 1176-77 (N.D. N.Y. 1990), confirms that the resolution of Brocail's claims do not require any interpretation of the CBA or UPC. ***There, the CBA gave the team physician the discretion to determine what medical care the player would receive.*** It placed the medical care that the player was entitled to receive entirely within the discretion of the team's physician: "'[i]f Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract ***as the Club physician may deem necessary***. . . .'" *Id.* at 1174 (emphasis added).

[18] The CBA also addressed the player's right to receive information from the team regarding his medical condition: "'[i]f a Club physician advises a coach or other Club representative of a player's physical condition which could adversely affect the player's performance or health, the physician will also advise the player. . . ." *Id.* The player asserted that the team and its physicians did not provide adequate medical

care and withheld information regarding the true nature of his injury. *Id.* at 1173.

The team contended that its duty to provide medical care and information to the player arose exclusively from the CBA and that the resolution of the player's claims was substantially dependent on the CBA's interpretation. *Id.* at 1175. Because interpreting the CBA was necessary, it argued, the plaintiff's claims were subject to the mandatory grievance and arbitration procedure contained in the CBA, which the player had not followed. *Id.*

The district court agreed. It first noted that the team had no duty to provide medical care outside the CBA and UPC: "The Colts did not owe a duty to provide medical care to the plaintiff independent of the relationship established in the agreements." *Id.* at 1178. It concluded that whether the team had provided adequate medical care and fulfilled its duty to disclose information could not be resolved without interpreting the CBA and UPC:

> The court cannot resolve plaintiff's claims based on inadequate medical care without interpreting the clauses establishing those duties in the agreements. In addition, the court cannot resolve plaintiff's fraud and negligent misrepresentation claims without reference to Article XXXI, section 1 of the CBA, which establishes the duty of a club physician, and arguably the club, to inform a player of physical conditions "which could

> adversely affect the player's performance or health."

[19] *Id.* at 1178.

Here, the requirement that the Tigers provide reasonable medical services to Brocail was not imposed under the CBA or UPC. Neither the CBA or the UPC provide the Tigers, their physicians, or employees with the discretion to determine what medical care was "necessary" for the treatment of Brocail's injury. *Id.* at 1174. Additionally, neither the CBA nor UPC imposes a duty on the Tigers "to inform a player of physical conditions 'which could adversely affect the player's performance or health.'" *Id.* Nor does it create or preclude any duty by Tiger employees, such as team trainers, to provide medical services or information to players.

Instead, the CBA and UPC refers to the reimbursement of "medical and hospital expenses incurred." R. 138 at ¶2. Specifically, the regulations attached to the UPC provide that the player's disability is not a bar to the reimbursement of medical expenses: "[d]isability directly resulting from injury sustained in the course and within the scope of his employment under this contract shall not impair the right of the Player to receive his full salary . . . together with the ***reasonable medical and hospital expenses incurred*** by reason of the injury. . . ." R. 138 at ¶2 (emphasis added). Additionally, it gives the Tigers the option of requiring a player to be examined by or seek treatment from a "regular physician or

dentist," but it does not address care, treatment or information provided by a specialist physician or the Tigers' employees, including trainers. R. 138 at ¶2. Nor does it create or preclude duties of care or a duty not to defraud owed by the Tigers. R. 138 at ¶2.

[20] **3. Even Westhoff was unable to identify any part of the CBA or UPC that needs to be interpreted to resolve Brocail's tort claims.**

Although the CBA and UPC do not cover the rendition of health care and medical care by Tiger employees, Westhoff claimed that Brocail should have filed a grievance merely because article XIII mentions some safety and health-related issues. R. 733. However, Westhoff could not identify any part of article XIII that must be construed in order to resolve Brocail's tort claims. As shown below, there is no such provision.

Subsection A of article XIII of the CBA deals with recommendations regarding policies for safe and healthful ***working conditions***. R. 533. It provides for the establishment of a "bipartisan Safety and Health Advisory Committee" whose purpose is "to deal with emergency safety and health problems as they arise, and attempt to find solutions," and to review, plan for, and maintain "safe and healthful working conditions for Players." R. 533 at p. 38. The committee's authority is limited to making "recommendations" "as to the solution of problems and the

establishment of policies." R. 533 at p. 39. Its authority is advisory and it may not impose its recommendations on the parties. R. 533 at p. 39.

Since Subsection A deals with the formation and authority of the Safety and Health Advisory Committee, it does not create or preclude duties of care or a duty not to defraud owed by a club or its employees when providing health or medical care or information or when hiring, supervising, or retaining its employees. R. 533. Nor does it give the Advisory Committee any authority to implement any solutions or resolve any health issues. R. 533.

[21] Moreover, the meaning of the provisions authorizing the committee to make nonbinding, advisory recommendations on policies regarding player working conditions has no bearing on Brocail's tort claims. R. 533. Although Subsection A(4) refers to the filing of grievances, it simply states that the existence and workings of the Safety and Health Advisory Committee does not "diminish or interfere with any other rights and remedies the Players or the Association may pursue under the Grievance Procedure of this Agreement or under the procedures established pursuant to the Occupational Safety and Health Act." R. 533 at p. 39. Nowhere does it require a player to file a grievance arising from medical care that a club was never obligated to provide under the CBA or UPC. R. 533 at p. 39.

Nor must any provision in Subsection B, which deals with the Players' Association's "safety

complaints" to the League Presidents, be interpreted in order to resolve Brocail's claims. R. 533 at p. 39. The provision deals with "safety complaints" made by the Players' Association, not an individual player. R. 533 at p. 39. It requires the League President to "promptly designate a representative to investigate and to attempt to resolve the problem" and to "notify the Association of the results of the investigation and of all attempts to resolve the problem." R. 533 at p. 39. Brocail's claims are not based on or related to a "Safety Complaint" made by the Players' Association to a League President.

Subsection C deals with the procedures that the clubs must use to place players on the disabled list. R. 533-34 at p. 39-40. It requires club physicians to complete a "Standard Form of Diagnosis." R. 533-34 at p. 39-40. It does not require the teams to [22] provide medical care to players nor does it govern a club's representations. R. 533-34 at p. 39-40. Nor does it specify any requirements, standards, or policies that trainers and other employees must follow when they provide care or information. R. 533-34. Brocail's claims are not dependent on the meaning of any part of Subsection C.

Subsection D provides players with the right to receive a second medical opinion relating to an on-the-job injury. R. 534 at p. 40. Its primary purpose is to obligate the clubs to pay the expenses incurred in obtaining such an opinion. R. 534 at p. 40. It is undisputed that Brocail requested and received a second opinion, so his claims are not based on any lack of

compliance with Subsection D's terms. Westhoff agreed that Brocail's claims involved no dispute arising under these provisions. R. 733.

Subsection E requires each club to employ two trainers who are certified or licensed. R. 534 at p. 40. It does not create or preclude a duty of care owed by them or other Tiger employees when providing care or information. Nor does it create or preclude any duty of care that the Tigers owe to supervise its employees and ensure that they are fit for their employment duties and perform them properly. Nor does it create or preclude any duty to disclose information about a player's condition. Westhoff agreed that Brocail's allegations did not assert that the Tigers had violated these requirements. R. 734.

Subsection F requires that each club maintain certain equipment in the visiting club's locker room. R. 534 at p. 41. Brocail's tort claims do not involve these requirements.

[23] Finally, Subsection G deals with visiting players' rights to receive medical information after they have received treatment from the home team's physician. R. 534 at p. 40. Since Brocail was not a visiting player in relation to the Tigers, this provision did not apply to him and has no effect on his claims.

Westhoff also claimed that Regulation 2 required Brocail to file a grievance to assert that be received inadequate medical care. R. 739. Regulation 2 requires a player to submit to a medical examination and treatment by a "regular doctor or dentist,"

entitles him to receive his full salary even if he is disabled and cannot play, obligates the club to pay the medical expenses he incurs to treat an on-the-job injury, and provides that if the player receives workers compensation benefit payments, he must pay them over to the club. R. 598 at p. 169. However, Westhoff agreed that Brocail's claims did not involve any party's failure to comply with any requirement in Regulation 2. R. 739. Moreover, the regulation does not create or preclude any duty owed by the Tigers to provide medical services to Brocail. Nor does it create or preclude a duty of care owed by trainers and other Tigers' employees when providing care, carrying out physician's orders, or disclosing and providing information. Nor does it create or preclude a duty of care owed by the Tigers when hiring, retaining, or supervising employees. Consequently, nothing in Regulation 2 must be construed in order to resolve Brocail's tort claims.

The other provisions that the Tigers belatedly asserted also did not need to be interpreted to resolve Brocail's claims. Attachment 7 to the CBA does not give individual players the right to file grievances concerning "health and safety" as the Tigers erroneously contended. R. 573. Instead, it explicitly provides: "This will set the [24] understanding that the ***Association*** may properly file and pursue through arbitration a grievance concerning health and safety." R. 573.

Article XXIX of the CBA states that it is a "complete, full and final understanding on all

bargainable subjects. . . ." R. 567-68. As shown above, the CBA does not state any understanding about the creation or preclusion of duties of care and disclosure that the Tigers and their employees owe under state law.

Article II of the CBA merely recognizes that the Players Association as the sole and exclusive collective bargaining agent. R. 514. The Tigers failed to show how this provision was required to be interpreted to resolve Brocail's claims.

In the end, Westhoff's conclusions were nothing more than the improper application of the judicially disavowed tangentially related standard. As the Supreme Court has declared, "not every dispute . . . tangentially involving a provision of a collective bargaining agreement is preempted. . . ." *Lingle*, 486 U.S. at 413 n.12. Westhoff was under the erroneous impression that anything related to a player's employment was covered by the CBA or UPC:

> I – I just believe ***that any issue that comes up***, whether he received is appropriate, whether medical expenses were taken care of, whether he has a right to see a doctor, whether the – the – he has right to a – a second opinion doctor, whether he – he receives his salary, ***any employment related issues would he covered by the basic agreement***.

R. 735 at pp. 179-80 (emphasis added). Of course, the Tiger's obligation to provide reasonable medical care

to Brocail was employment related, but was not an issue covered by the CBA. Since there is no CBA or UPC provision that creates or precludes the duties that underlie Brocail's tort claims, they are not pre-empted under the LMRA and Brocail [25] was not required to comply with the CBA's grievance procedures. *See Lingle*, 486 U.S. at 405-06.

D. Brocail's Claims Involve Only Factual Questions About The Conduct And Motives Of The Tigers.

The nature of Brocail's allegations further confirms that interpretation of the CBA and UPC is unnecessary here. They present only factual issues pertaining to the Tigers' conduct and motives. In *Feitl v. Los Angeles Clippers*, 1995 WL 100596 (9th Cir. 1995) (not designated for publication), the court recognized that elements of the player's common-law fraud claim did not require the interpretation of a CBA. The player alleged that the Clippers orally agreed to hire him. *Id.* at *1. Although the parties had not executed a written contract, the player rejected an offer to play professional basketball in Spain in reliance on the oral agreement. *Id.* Subsequently, the team notified the player that it would not employ him. *Id.*

The court analyzed each element of the cause of action to determine whether interpretation of the CBA was necessary. *Id.* at *3. It concluded that three

of the elements did not require the CBA's interpretation:

> The first three elements of Feitl's claim for fraud – misrepresentation, knowledge of falsity, and intent to defraud – do not require interpretation of the CBA. They turn on LAC's frame of mind. Resolution of these elements are "purely factual questions pertaining] to . . . the conduct and motivation of the employer."

Id. The court also concluded that the CBA did not cover the damages element. *Id.* The justifiable reliance element was covered, however, because the CBA required that any employment agreement be in writing. *Id.*

[26] Here, the elements of Brocail's tort claims do not require the interpretation of the CBA or UPC.[2] Clearly, the misrepresentation elements of Brocail's negligent misrepresentation and fraud claims turn on

---

[2] The elements of a claim for negligent misrepresentation are "a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care." *Law Offices of Lawrence T. Stockler, P.C. v. Rose*, 436 N.W.2d 70, 81 (Mich. Ct. App. 1989). A fraud claim has the following elements: (1) a material misrepresentation made by the defendant, (2) which was false, (3) that the defendant knew was false when made or made the misrepresentation recklessly as a positive assertion without knowledge of its truth, (4) the misrepresentation was made with the intent that the plaintiff act on it, (5) the plaintiff acted in reliance on the misrepresentation, and (6) the plaintiff was injured. *Hi-Way Motor Co. v. Int'l Harvester Co.*, 247 N.W.2d 813, 815-16 (Mich. 1976).

the Tigers' frame of mind. *See id.* So do the knowledge of falsity and intent to defraud elements of his fraud claim. *Id.* None of the provisions analyzed above or any other had to be interpreted to determine that the Tigers owed a duty of care not to make misrepresentations, which they owed generally to members of the public under the common law. *Hi-Way Motor Co.*, 247 N.W.2d at 815-16; *Rose*, 436 N.W.2d at 81. Moreover, no provision precluded Brocail's justifiable reliance on the Tigers' misrepresentations as the CBA did in *Feitl*. Nor do the CBA and UPC cover the damages elements of Brocail's claims. *Feitl*, at *3.

Moreover, whether the Tigers' employees failed to follow physicians' orders is a fact issue pertaining to their conduct. *See id.* Whether the Tigers failed to hire employees that could properly monitor, diagnose, and treat Brocail's condition is another. *Id.* The Tigers did not show that it was necessary to interpret any provision in the CBA or UPC to resolve the factual issues they identified in their motion. At best, the Tigers only claimed that the various fact issues "implicate" the CBA. R. 110. Yet mere implication is insufficient. *Lingle*, 486 U.S. at 413 (stating that disputes tangentially involving a provision of a CBA are not preempted; R. 12. Because the Tigers failed to [27] sustain their burden to show that they were entitled to judgment as a matter of law, the summary judgment should be reversed.

E. The Tigers Owed The Common-Law Duties Alleged By Brocail To The Public.

Brocail asserted free-standing state law tort duties that did not exist solely because of the CBA or UPC. Michigan law imposed upon the Tigers a common-law duty to exercise reasonable care when making representations. *Rose*, 436 N.W.2d at 81. It imposed a common-law duty not to commit fraudulent misrepresentations. *Hi-Way Motor Co.*, 247 N.W.2d at 815-16. Finally, Michigan law imposed a duty on the Tigers to exercise due care when hiring, retaining, and supervising employees that were fit to perform the tasks that the Tigers assigned them. *Zsigo v. Hurley Medical Ctr.*, 716 N.W.2d 220, 227 (Mich. 2006). No contractual relation between Brocail and the Tigers was necessary for these duties to exist.

In *Brown v. National Football League*, 219 F.Supp.2d 372 (S.D. N.Y. 2002), the court recognized that stand-alone state law tort claims are not pre-empted. There, a professional football player asserted state common-law negligence claims against the National Football League (NFL) after he sustained a career-ending eye injury when he was struck by a weighted penalty flag that was thrown by a referee during a game. *Id.* at 376. The player alleged that the NFL was negligent because it breached its duty to hire and employ competent referees and to train and supervise them regarding the throwing of penalty flags. *Id.* The player also asserted that the NFL was vicariously liable for the referee's negligence because

he was an employee. *Id.* The NFL claimed that the player's [28] reliance on the NFL's Rules and the NFL Officials Mechanics Manual issued to referees showed that the alleged duty existed solely because of the CBA and therefore had to be arbitrated under its terms. *Id.* at 377.

After noting that the LMRA preempts state law claims that involve the interpretation and application of a CBA, the court observed that "[i]t does not follow, however, that any state tort suit brought by an employee covered by a CBA is preempted by the LMRA." *Id.* at 378. It further concluded:

> If there is a free-standing state tort duty, the Supreme Court has repeatedly advised that "it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

Id. at 379-80.

The court concluded that the player's claims were based on free-standing state common-law duties. *Id.* at 380. It noted that state law provided that an employer could be liable for its negligence in hiring or retaining an employee who is incompetent or unfit. *Id.* It concluded that the duty of care was not created by the CBA:

> No contractual relation between the plaintiff and the employer is necessary to such a tort action, a similar cause of action would lie in

> favor of any member of the public injured by an unfit employee.

Id.

The court also concluded that the theory of respondeat superior was not a creation of the CBA:

> The theory of respondeat superior is similarly generally applicable when an employee injures a third party while acting within the scope of his or her employment. It is clear that [the referee], as an NFL referee, was acting within the scope of his employment when he threw the penalty flag [29] to signal a rule violation during the course of play. It is also clear that Plaintiffs have adequately stated a claim that the referee was negligent in a manner that would give rise to a cause of action on the part of any member of the general public who might have been injured by his conduct. A special contractual obligation to use due care in throwing small weighted objects, so as to avoid injuring one's fellow citizens, is not necessary for liability.

Id. (citations omitted). The court then determined that the CBA did not incorporate the rules or the manual and that the player's claim did not require the interpretation of the CBA. *Id.* at 387.

Here, Brocail similarly alleged that the Tigers and its employees breached state common-law duties and were negligent or grossly negligent. R. 68-74. He alleged that the Tigers failed to use due care in hiring and supervising employees, *e.g.*, trainers or members

of the front office, that either provided health care services or information. R. 68, 69, 70, 74. He asserted that the Tigers' trainers and employees were negligent in providing care or information and that the Tigers were vicariously liable. R. 68-74. He also alleged that the Tigers negligently and fraudulently misrepresented that the proposed treatment was appropriate for his condition. R. 70-74.

Moreover, these duties were owed to the public. For example, if a Tiger employee, *e.g.*, a trainer, rendered aid to a fan or an umpire injured by a foul ball or a thrown bat, the Tigers would owe a duty of care to see the employee was fit, able, and had the expertise to properly perform those services. *Zsigo*, 716 N.W.2d at 227. If the Tigers encouraged an injured fan to allow that employee to render a particular type of aid by representing that the care was appropriate for the injury or that the employee had the necessary expertise to render the aid when he did not, the Tigers would have had a state [30] common-law duty to exercise due care to ensure that the representations were not false. *Rose*, 436 N.W.2d at 81. Moreover, the Tigers owe a duty to anyone with whom they deal not to defraud them. *Hi-Way Motor Co.*, 247 N.W.2d at 815-16.

In their motion for summary judgment, the Tigers did not show that any part of the CBA or UPC created or precluded any duty of care that the Tigers owed in the hiring, retaining and supervisions of its employees. Nor did they show that any part of the CBA or UPC created or precluded the Tigers' duty to

exercise reasonable care when making disclosures or representations or the duty not to defraud someone. Finally, the Tigers failed to show that any part of the CBA or UPC created or precluded any vicarious liability theory.

* * *

ORAL ARGUMENT REQUESTED

No. 14-06-557-CV

IN THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

DOUGLAS K. BROCAIL,

APPELLANT,

VS.

DETROIT TIGERS, INC.,

APPELLEE.

BRIEF OF APPELLEE, DETROIT TIGERS, INC.

GARDERE WYNNE SEWELL LLP

Jeffrey S. Davis
State Bar No. 00783936
Peter Scaff
State Bar No. 24027837
Lloyd S. van Oostenrijk
State Bar No. 24056467
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Telephone: (713) 276-5500
Facsimile: (713) 276-5555

ATTORNEYS FOR APPELLEE, DETROIT TIGERS, INC.

* * *

[12] **III. Brocail's claims are preempted by federal labor law.**

A. The proper analytical framework for determining preemption.

Although Brocail pled his claims as state law claims, his allegations must be treated as federal law claims under Section 301 of the Labor Management Relations Act (the "LMRA"), codified at 29 U.S.C. §§ 141.187. Section 301[2] provides the exclusive remedy for individual employees asserting claims against an employer that implicate a collective bargaining agreement. *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994); *Landry v. Cooper/T. Smith Stevedoring Co., Inc.*, 880 F.2d 846, 850 (5th Cir. 1989). When applicable, Section 301 "preempts" state law claims in that "only the federal law fashioned by the courts under Section 301 governs the interpretation and [13] application of collective bargaining agreements." *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172 1176-77 (N.D.N.Y. 1990). Importantly, the preemptive effect of Section 301 applies to causes of action arising in both contract and tort. *Id.* at 1177 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985)).

---

[2] Section 301 of the LMRA provides, in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties." 29 U.S.C., § 185(a).

Brocail contends that his claims are not preempted because the Tigers purportedly failed to identify a single provision of the CBA that "must be interpreted." However, the test for determining preemption is not whether an explicit provision of the written collective bargaining agreement can be identified for "interpretation." Instead, "[t]he test to be used in applying [whether a case is a section 301 claim] is to determine if "the *duty to the employee* of which the tort is a violation is created by a collective-bargaining agreement and *without existence independent of the agreement.*" *Sherwin*, 752 F. Supp. at 1177 (emphases in original) (citations omitted). Here, Brocail's own expert derives the purported duties that the Tigers are alleged to owe from the "effective" language in the CBA, the UPC, and the Regulations. (2 C.R. 603-04).

In *Intern. Brotherhood of Elec. Workers, AFL-CIO v. Hechler,* the United States Supreme Court explained that the threshold question for determining whether a claim is preempted is "an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *International Brotherhood of Elec. Workers, AFL-CIO v. Hechler,* 481 U.S. 851, 861 (1987) ("Respondent's allegations of negligence assume significance if – and only if – the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached."). As further explained,

> [14] [i]n order to determine the Union's tort liability, however, a court would have to

> ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Heckler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability."

Id. at 860 (internal citations omitted); *see also United Steelworkers of America, AFL-CIO-CLC, v. Rawson*, 495 U.S. 362, 369 (1990). Eschewing the myopic view Brocail would have this Court apply, the *Hechler* Court further noted that a claim is preempted even if a determination is required as to the *implicit* meanings of a collective bargaining agreement. *Hechler*, 481 U.S. at 860.

It is instructive to note that the *Hechler* court's examination focuses significantly on "the particular responsibilities alleged" in the plaintiff's pleadings, an undertaking that Brocail markedly avoids in his brief. *Id.* Brocail also improperly characterizes the preemption in *Hechler* as occurring because the plaintiff's claims were "entirely dependent" on the CBA and ancillary agreements. Appellant's Brief at 7. In doing so, Brocail attempts to improperly heighten the burden required for preemption. As stated by the Supreme Court, the issue is whether the claims are "substantially dependent" on an analysis of the CBA,

not whether they are "entirely dependent." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Stated another way, the proper standard is whether the claims pled by the plaintiff were "sufficiently independent" of the CBA to avoid preemption, not whether they are "entirely dependent." *Hechler,* 481 U.S. at 859. For example, in *Rawson*, while the plaintiff specifically pled a state law claim for the [15] employer's negligent inspection of a mine, the allegations necessarily arose under the CBA because a duty to inspect also arose from the CBA. *United Steel Workers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 364-65 (1990). The Supreme Court concluded that even though the duty to inspect reasonably arose under state tort law, it could not be described as independent of the CBA. *Id.* at 371. Thus, Brocail incorrectly claims that preemption applies only when the allegations are "entirely dependent" on the CBA. Instead, Brocail's claims are preempted if they are "dependent" in any way on interpretation of the CBA.

Further, as demonstrated by *Burgos v. Southwestern Bell Telephone Co.*, a claim need not expressly rely on any provision of the CBA to be preempted, *Burgos v. Southwestern Bell Tel. Co.*, 20 F.3d 633, 636 (5th. Cir. 1994). In several instances employees have sued their employers for intentional infliction of emotional distress based on either discriminatory conduct or even intentional torts, and those claims have been preempted even where the CBA was not expressly implicated. *See Burgos*, 20 F.3d at 636 (holding that an employee's claim for intentional

infliction of emotional distress based on his employer's repeatedly transferring him to various positions was preempted because it was necessary to examine those provisions of the CBA that governed work-force adjustments). Similarly, in *Foy v. Giant Food, Inc.*, the Fifth Circuit relied on *Burgos* and held that an employee's claim for intentional infliction of emotional distress and malicious prosecution were preempted because they required the court to examine the provisions of the CBA that governed the ground for termination. *Foy v. Giant Food, Inc.*, 298 F.3d 284, 287-289 (5th Cir. 2002). The fact that Foy, like Brocail, had dropped [16] his claim for explicit breach of the collective bargaining agreement was of no consequence. *Id.* at 286.

Thus, the proper analysis cannot be a simplistic examination of whether a specific provision of the CBA must be interpreted, because even when a determination is required as to the *implicit* meanings of a collective bargaining agreement, the claim is nevertheless preempted. *Tice v. American Airlines, Inc.*, 288 F.3d 313, 316 (7th Cir. 2002) (Posner, J.) ("It is true . . . that the agreement nowhere states *in so many words* that a permanently disqualified captain cannot bump a flight officer. But contracts, including collective bargaining agreements, frequently contain implied terms. . . . Whether a collective bargaining agreement contains such terms is a question of interpretation to be decided by arbitrators when arbitration is the designated method of resolving issues arising under the agreement"). Instead, if the CBA

must be examined to determine the existence and scope of duties that are alleged by the plaintiff in his pleadings to exist or have been breached, then Section 301 applies, and the claims are preempted.

B. Brocail's agreements governing his employment, his pleadings and his expert's report show that his claims are preempted.

Brocail's position that his claims are wholly independent of the CBA is disingenuous given the allegations in his pleadings and the notable opinion provided by his retained expert, which Brocail has consistently and conspicuously ignored throughout the course of the summary judgment proceedings in the trial court and which remains unaddressed in his brief in this appeal: "*Read together, the Collective Bargaining Agreement, the UPC, and the Regulations establish that a Major League club, such as the* [17] *Detroit Tigers, effectively has a non-delegable duty to provide reasonable and appropriate medical care to its players including an obligation to provide proper treatment and rehabilitation for their injuries.*" (2 C.R. 603-04). By way of example, a court would have to refer to the following provisions of the CBA, the UPC and the Regulations to determine the claims alleged in Brocail's petition:

- Regulation 2 of the UPC provides that "The Player, when requested by the Club, must submit to a complete physical examination at the expense of the Club, and if necessary to

treatment by a regular physician. . . ." (1 C.R. 138).

- Paragraph 3.(a) of the UPC provides that a player agrees to keep himself in first class physical condition and obey all training rules (1 C.R. 134).

- Article II of the CBA states that the Major League Players Association is the sole and exclusive collective bargaining agent for all major league players, with regard to all terms and conditions of employment (2 C.R. 514).

- Article XI broadly defines "grievance" as a complaint which involves the existence or interpretation of, or any compliance with, any agreement, or any provision of any agreement between a player and a club (2 C.R. 528-29).

- Article XIII deals with safety and health of players, including but not limited to issues surrounding a team doctor's prognosis under a Standard Form Diagnosis, and including the right of a player to seek a second medical opinion other than one offered by the team physician (2 C.R. 533). As John Westhoff stated in his deposition: "Clearly, the issues – or one of the issues raised is whether we provided appropriate or adequate medical treatment to the player. And I think there's a reference here – or at least I would argue that that could have been, and should have been, pursued through the grievance procedure." (3 C.R. 732).

- Article XXIX provides that the CBA represents a complete, full and final understanding on all bargainable subjects, which includes health and safety (2 C.R. 567).

- [18] Lastly, Attachment 7 to the CBA provides that a player, such as Plaintiff, may properly file and pursue through arbitration a grievance concerning health and safety (2 C.R. 573-74).

It is axiomatic that a plaintiff is the master of his pleadings, and it was Brocail's choice, not the Tigers', to determine the nature of his claims and the source of the duties that he alleged were breached. The ostensible duties to provide reasonable and appropriate medical care opined by Brocail's expert to derive from the CBA, UPC and Regulations are patently encompassed within those duties that Brocail claims were breached in his live pleading and discovery responses, not only in connection with his now abandoned "contractual" claims, but also his remaining "tort" causes of action, as shown by the following comparison of just a few of the dependent provisions:

PLAINTIFF'S ALLEGATION	CORRESPONDING §§ of CBA
The Tigers did not provide a proper second opinion before encouraging, endorsing and/or directing that Brocail undergo treatment (2 C.R. 492-93).	CBA at p. 40, and Attachment 7 to CBA (2 C.R. 534, 573).

The Tigers failed to perform the appropriate qualifying examinations, including pre-participation or qualifying status (2 C.R. 492-93).	Regulation 2 and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
"Defendant breached a contractual duty to ensure that the team personnel it required Brocail to seek treatment from possessed the necessary expertise, skill, training, experience, ability, competence and/or knowledge to properly diagnose and treat the particular injury that Brocail sustained" (2 C.R. 497-98).	Regulation 2 (requiring Plaintiff to undergo medical treatment directed by the Tigers), and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
"Defendants breached Paragraph *3.(a) Loyalty and Regulations: Paragraph 2* of the Uniform Player's Contract signed treatment directed by the Tigers), and between Defendant and Plaintiff" (2 Supp.C.R. 445).	UPC para. 3.(a) and Regulation 2 (requiring Plaintiff to undergo medical treatment directed by the Tigers), and Attachment 7 to CBA (1 C.R. 134-35, 138; 2 C.R. 573).
[19] The Tigers had a duty to provide medical treatment from providers that possessed the requisite expertise, skill, training, experience, ability, competence and/or knowledge (2 C.R. 492-99).	Regulation 2 and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).

The Tigers had a duty to monitor Brocail's health, physical condition, conditioning and well being, the need for medical care and treatment, and the propriety of diagnoses rendered and treatments recommended by the team personnel and their effects on Brocail's health and performance (2 C.R. 492-99).	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
The Tigers required Brocail to adhere to training rules and regimens that directly affected his health, physical condition, and well being (2 C.R. 492-99).	UPC para. 3.(a) and Regulation 2, and Attachment 7 to CBA (1 C.R. 134-35, 138; 2 C.R. 573).
The Tigers had a duty of reasonable disclosure of the available choices with respect to the proposed therapy and of the dangers that are inherently and potentially involved in each procedure to Brocail (2 C.R. 492-99).	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
The Tigers were required to disclose all information that is necessary to make a knowledgeable decision about any proposed treatment (2 C.R. 492-99).	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).

The Tigers had a duty to perform appropriate examinations, including pre-participation or qualifying status to identify future risk of injury, to determine Brocail's fitness to participate and/or continue to participate in baseball, to prevent subsequent injury (2 C.R. 492-99).	UPC para. 3.(a) and Regulation 2 (requiring Plaintiff to undergo medical treatment directed by the Tigers), and Attachment 7 to CBA (1 C.R. 134-35, 138; 2 C.R. 573).
The Tigers had a nondelegable duty to provide appropriate team personnel to Brocail (2 C.R. 492-99).	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
The Tigers had a duty to perform its contracts with care, skill, reasonable expedience and faithfulness with regard to Brocail (2 C.R. 492-99).	UPC para. 3.(a) and Regulation 2 (requiring Plaintiff to undergo medical treatment directed by the Tigers), and Attachment 7 to CBA (1 C.R. 134-35, 138; 2 C.R. 573).

[20] C. Brocail's attempt to impeach his own expert and disavow his pleadings is ineffective.

Once the Tigers filed its summary judgment motion, Brocail's admittedly creative, albeit ineffective, response was an attempt to impeach his own expert and disavow his own pleadings through the deposition of the Tigers' General Counsel, John Westhoff. In his deposition, Brocail asked questions designed to have Mr. Westhoff confirm that the Tigers deny the

existence and scope of various duties alleged to have been breached by Brocail and opined by his expert to arise from the CBA, the UPC and the Regulations. Brocail then used those denials to ostensibly support his position that Brocail's claims are not dependent upon the CBA. However, it is Brocail's pleadings, discovery responses and own retained expert's report that rule the day with regard to the source and nature of Brocail's claims, not the Tigers' opinions of same. *Hechler*, 481 U.S. at 860.

D. Brocail's authorities are distinguishable.

Brocail argues that *Hawaiian Airlines, Inc. v. Finazzo*, 512 U.S. 246, 261 (1994), supports his position that his claims arise independently of the CBA. However, Brocail fails to note the difference between the "independent" claim at issue in *Finazzo*, a state law whistle blower claim, and the facts of this case. In *Finazzo*, no preemption existed because the employee's claim did not rely on any implied or express provision of the CBA. *Hawaiian Airlines*, 512 U.S. at 261, Here, a determination that Brocail's claims are wholly independent would require the Court to ignore the allegations of Brocail's petition and the report of Brocail's own expert, both of which are dependent upon the CBA at issue herein.

[21] Surprisingly, Brocail also claims that *Sherwin v. Indianapolis Colts* supports his position that no part of the CBA or UPC needs to be interpreted to

resolve his claims (Appellant's Brief, at 17). While the Tigers believe the *Sherwin* case is strikingly similar to this case, *if not dispositive*, it disagrees with Brocail's interpretation. In *Sherwin*, a professional football player was injured during a practice game, treated by team physicians, subsequently traded to another team, and thereafter suffered a career ending injury in his first regular season football game. *Sherwin v. Indianapolis Colts*, 752 F. Supp. 1172, 1174 (N.D.N.Y. 1990). Sherwin alleged that the career-ending injury was the result of the injury he sustained during the practice game prior to being traded, that the team physicians failed to provide adequate medical treatment, and that they intentionally misrepresented the true nature of his medical condition to his detriment. *Id.* Like Brocail, Sherwin argued that his tort claims were not preempted by the CBA and standard player agreement governing his employment. *Id.* at 1176-79. The court rejected Sherwin's argument, holding that his claims were substantially dependent on the collective bargaining agreement. *Id.* at 1179.

Brocail's attempt to interpret *Sherwin* in its favor is wholly unpersuasive. In *Sherwin*, the player alleged (1) that the team had a duty to provide its players with "appropriate and necessary care, attention and treatment," and (2) that the team committed a fraud upon the player by intentionally withholding the true nature of his injury. *Id.* at 1178. These allegations are substantially identical to those made by Brocail in his live pleading (1 C.R. 490-97).

[22] As in *Sherwin*, to the extent that the Tigers had any such duties, they could only arise from the CBA, UPC, or Regulations. Furthermore, no appreciable difference exists between the express language of the CBA in *Sherwin* and in this case. In any event, as the court's analysis in *Sherwin* instructs, the determination of preemption significantly depends upon the allegations made in the plaintiff's pleadings. In this case, Brocail plainly asserts duties that are substantially dependent upon the CBA.

Brocail also cites to *Feitl v. Los Angeles Clippers*, No. 93-56170, 1995 WL 100596 *4 (9th Cir. Mar. 8, 1995) in support of his argument that his allegations only involve factual questions regarding the Tigers' "conduct and motives" and thus are not preempted. Appellant's Brief, at 25. Notably, however, the *Feitl* court ultimately held that plaintiff's claim was preempted under Section 301 because it was inextricably intertwined with the language of the CBA and the arbitration clause. *Feitl v. Los Angeles Clippers*, No. 93-56170, 1995 WL 100596 *4 (9th. Cir. Mar. 8, 1995) (because plaintiff knew at the time of the alleged fraud that any claim he might have was governed by a CBA, he was required to prove that "his reliance was *justified in light of the CBA*.") (citing *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1992), *cert. denied* 113 S.Ct. 2927 (1993)). The plaintiff in *Feitl* was a veteran NBA player who had been subject to the CBA for at least five years. *Feitl*, at *4. In this ease, Brocail has been a

major league baseball player since 1992. As stated by the Ninth Circuit:

> Only by examining the CBA can one determine whether it is reasonable or justifiable for Feitl to rely on oral representations of employment by LAC. A claim of fraud is preempted where "reference to, and interpretation of, the terms of the collective bargaining agreement" is necessary. *Bale*, 795 F.2d at 780. Accordingly, Feitl's state law cause of action for fraud was [23] "'inextricably intertwined' with an analysis of the CBA," and was therefore preempted by § 301. *Schlacter-Jones v. General Tel. of Cal.*, 936 F.2d 435, 550 (9th Cir. 1991).

Feitl, at *3.

Lastly, Brocail argues that the duties owed by the Tigers to Brocail were also owed by the Tigers to the general public, citing *Brown v Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002). Appellant's Brief at 27. While involving an injury to a professional athlete, *Brown* is otherwise inapposite. Brown is a respondeat superior negligence suit based upon a referee throwing a penalty flag weighted with "BBs" and hitting a player in the eye, ending his career. *Id.* at 376 ("Thus, Plaintiffs' theory is that this is a garden-variety tort action invoking a general duty to avoid negligently causing harm not only to its own players but also to any other person in society. . . ."). The court ultimately found that the duties owed by the NFL to the player were those owed to the general

public and were not preempted. *Id.* at 380. Brocail's claims, however, can in no way be described as "garden-variety." In this case, Brocail alleges breaches of duties to provide a proper second opinion before encouraging, endorsing and/or directing that Brocail undergo treatment; to ensure that the team personnel it required Brocail to seek treatment from possessed the necessary expertise, skill, training, experience, ability, competence and/or knowledge to properly diagnose and treat Brocail's injury; to reasonably disclose available choices with respect to the proposed therapy and of the dangers that are inherently and potentially involved in each procedure; to perform appropriate examinations, including pre-participation or qualifying status to identify future risk of injury; to determine Brocail's fitness to participate and/or continue to [24] participate in baseball; and to monitor Brocail's health, physical condition, conditioning and well being, the need for medical care and treatment and the propriety of diagnoses rendered and treatments recommended by the team personnel and their effects on Brocail's health and performance (2 C.R. 492-99). The particularized duties alleged to have been breached by Brocail go well beyond any general state-law duty owed to the public to not negligently throw an object and hit someone in the eye.

Brown is further distinguished from the facts of this case because the plaintiff therein sued a third-party entity and nonparty to the CBA at issue, the NFL, not his employer, the Cleveland Browns Football Company. *Brown*, 219 F. Supp. 2d at 383 ("On the

surface, [the NFL's] claim is dubious, because the NFL is neither Brown's employer nor a party to the CBA. In contrast, Brocail is *directly* suing his employer who is a party to the CBA.

* * *

NO. _____

IN THE SUPREME COURT OF TEXAS

DOUGLAS K. BROCAIL,

Petitioner

v.

DETROIT TIGERS, INC.,

Respondent

On Petition for Review from Cause No. 14-06-00557-CV
In the Court of Appeals for the Fourteenth District of Texas

PETITION FOR REVIEW

Bruce E. Ramage
State Bar No. 16492500
Levon G. Hovnatanian
State Bar No. 10059825
Dale Jefferson
State Bar No. 10607900
MARTIN, DISIERE, JEFFERSON & WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Facsimile

Michael Lowenberg
State Bar No. 24001164
THE O'QUINN LAW FIRM
2300 Lyric Centre Building
440 Louisiana Street
Houston, Texas 77002
(713) 223-1000 – Telephone
(713) 222-6903 – Facsimile

Thomas W. Pirtle
State Bar No. 16038610
LAMINACK, PIRTLE & MARTINES
440 Louisiana, Suite 1250
Houston, Texas 77002
(713) 292-2750 – Telephone
(713) 292-2755 – Facsimile

* * *

[6] **ARGUMENT**

I. THE LMRA DOES NOT PREEMPT ANY OF BROCAIL'S CLAIMS.

A. The LMRA Preempts Only Claims Whose Resolution Depends On The Interpretation Of A CBA.

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court[.]" 29 U.S.C. § 185(a). But "'[n]ot every dispute . . . tangentially involving a provision of a collective bargaining-agreement is preempted by § 301[.]'" *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 n.12 (1988) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)). Instead, preemption is limited only to claims that "depend[ ] upon the meaning of a collective-bargaining agreement[.]" *Lingle*, 486 U.S. at 405-06.

A state law claim that is "'independent' of the [collective bargaining] agreement" is not preempted. *Lingle*, 486 U.S. at 410. If the state law claim can be "resolved without interpreting the [collective bargaining] agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Id.* at 409-10. In other words, there is no preemption if the "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 407.

[7] In cases involving LMRA preemption, to "interpret" a CBA requires something more than a need to "consider" or "refer to" it. *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748-749 (9th Cir. 1993). A court's mere examination of a CBA to determine the preemption issue is not tantamount to interpreting the CBA. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1991). "Although the line between reference to and interpretation of an agreement may be somewhat hazy, merely referring to an agreement does not threaten the goal that prompted preemption – the desire for uniform interpretation of labor contract terms." *Ramirez*, 998 F.2d at 749 (citing *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962)).

While the line itself may be hazy, it is clear that "'purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) (quoting *Lingle*, 486 U.S. at 407). If the state-law claim can be resolved without actual *interpretation*, the claim is "independent" of the agreement and there is no preemption. *Norris*, 512 U.S. at 262 (quoting *Lingle*, 486 U.S. at 410). As discussed below, resolving Brocail's state tort-law claims does not require interpreting any part of the CBA.

B. The Resolution Of Brocail's Claims Does Not Require The Interpretation Of The CBA.

Brocail sued the Tigers for negligence, gross negligence, negligent misrepresentation, fraud, fraudulent concealment, fraudulent inducement, and breach of contract. CR 64-82. He alleged that the Tigers encouraged and directed him to seek [8] treatment from team personnel who did not possess the expertise to properly diagnose and treat his injury. CR 69. He also alleged that the Tigers encouraged and directed him to undergo treatment that would not cure his injury and failed to establish policies and procedures for the treatment of its players; failed to follow team physicians' orders; failed to fully disclose the true extent of his condition and his fitness to play baseball; failed to use reasonable care to protect his health; failed to fully advise him of the adverse effects of continued medical and rehabilitative treatment; failed to advise him of options regarding his condition; failed to provide a proper second opinion; and failed to perform appropriate examinations. CR 69-70. He further alleged that the Tigers were negligent in hiring team personnel, misrepresented that the proposed treatment was appropriate for his condition, and fraudulently induced him to sign a contract with the Astros. CR 68, 70, 72.

The court of appeals held that Brocail's claims that the Tigers breached a duty to provide reasonable medical services are not preempted by the LMRA.

Brocail, ___ S.W.3d at ___, 2008 WL 878511 at *7. The court was clearly correct on this point.

The duties implicated by Brocail's claims regarding the failure to provide reasonable medical services did not come from the CBA. Instead, those duties arise from the MWDCA, which provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

[9] MICH. COMP. LAWS § 418.315(1).[6] Thus, a court "need not look for [] an implied duty [to provide reasonable medical services] because the parties are bound by express state statutes . . . Because the determination of the [Tigers'] duty and alleged breach of duty to provide Brocail with reasonable medical services can be resolved without reference to the CBA [or] the UPC . . . these claims are not preempted by the LMRA." *Brocail*, ___ S.W.3d at ___, 2008 WL 878511 at *7.

---

[6] It is undisputed that Michigan law applies in this case. The trial court granted the Tigers' motion to apply Michigan law, which was not opposed. 1st Supp. CR 85, 564-75. The court of appeals also applied Michigan law. *Brocail*, ___ S.W.3d at ___, 2008 WL 878511 at *9, 11, 12, 14, 15.

But the court of appeals went on to hold that resolving Brocail's claims that the Tigers failed to provide a proper second opinion and fraudulently induced him to sign a contract with the Astros require interpreting the CBA. *Brocail*, ___ S.W.3d at ___, 2008 WL 878511 at *8. The court pointed to the fact that the CBA gives the player a right to seek a second opinion from a list of medical specialists. *Id.* But the court failed to recognize that a duty to provide a second opinion also falls within the provision of "reasonable medical services." Because such a duty may be discerned from section 418.315(1), it is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Lingle*, 486 U.S. at 409-10.

[10] In regard to Brocail's cause of action for fraudulent inducement, it was Michigan law, not the CBA or UPC, which imposed on the Tigers a duty not to make fraudulent misrepresentations. *See Hi-Way Motor Co. v. International Harvester Co.*, 247 N.W.2d 813, 815-16 (Mich. 1976). But the court of appeals concluded that Brocail's fraudulent inducement claim is preempted "[b]ecause the CBA governs assignment of his contract . . . In particular, it is necessary to interpret the CBA to determine whether Brocail's

consent to the assignment was necessary, and whether reliance on any misrepresentation by the [Tigers] concerning assignment of his contract was reasonable in light of the CBA." *Brocail*, ___ S.W.3d at ___, 2008 WL 878511 at *8.

Whether Brocail's consent was necessary is irrelevant. For his consent to be unnecessary would not legitimize the Tigers' actions. If his consent was necessary, it still could not have been freely given, because in Michigan as everywhere, "'fraud vitiates everything it touches.'" *Custom Data Solutions, Inc. v. Preferred Capital, Inc.*, 733 N.W.2d 102, 105 (Mich. Ct. App. 2006) (quoting John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9.21 at 340-41 (4th ed. 1998)).

Furthermore, "[f]raud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D. Begola Servs. v. Wild Bros.*, 534 N.W.2d 217, 219 (Mich. Ct. App. 1995). No provision of the CBA sets a standard for reasonable reliance or somehow precluded Brocail from relying on the Tigers' representations

[11] No part of the CBA (or UPC) need be interpreted to resolve any of Brocail's claims. *Hendy v. Losse*, 925 F.2d 1470 (9th Cir. 1991) (not designated or publication), demonstrates this point.

Hendy, a professional football player for the San Diego Chargers, inured his right knee in 1986 and

reinjured it in 1987. 925 F.2d at *1. The Chargers terminated his contract later in 1987. *Id.*

Hendy filed suit in California state court, asserting various tort claims against the Chargers and their team physician, Gary M. Losse, M.D. 925 F.2d at *1. Hendy's claims included negligent hiring and retention of Dr. Losse, intentional and negligent misrepresentation of his medical condition, and medical malpractice. *Id.*

The defendants removed the case on the ground that Hendy's claims were preempted by section 301. 925 F.2d at *1. They later moved to dismiss, asserting that Hendy's claims were governed by a collective bargaining agreement between the National Football League Players Association and the National Football League Management Council. *Id.* The district court dismissed the claims for negligent hiring and retention of Dr. Losse and intentional and negligent misrepresentation of Hendy's medical condition, and Hendy appealed. *Id.*

Hendy's claim for negligent hiring and retention of Dr. Losse alleged that Dr. Losse lacked the necessary knowledge and skill to treat Hendy's condition properly and that the Chargers knew or should have known of Dr. Losse's lack of skill, but negligently selected, hired and retained him as club physician anyway. 925 F.2d. at *2. The Ninth Circuit noted that "[t]he duty to use due care in the hiring and retention of employees [12] arises from state law" and therefore concluded that, "On its face, this claim

arises solely under state law and is wholly independent of the collective-bargaining agreement." *Id.* The court added that "[t]he identical claim could be asserted by anyone Dr. Losse treated in connection with his employment." *Id.* "Since the alleged breach and injury can be ascertained independent of the collective-bargaining agreement, section 301 does not preempt Hendy's negligent hiring and retention claim." *Id.* at *3.

Hendy's claims for intentional and negligent withholding of medical information alleged that Dr. Losse, with the consent of the Chargers and acting as their agent, misrepresented to Hendy that he was fit to play. 925 F.2d at *3. The defendants contended that the scope of their duty to disclose could only be determined by reference to the collective bargaining agreement. *Id.* The court ruled: "Again, Hendy does not assert any violation of the collective-bargaining agreement. Contrary to defendants' arguments, Dr. Losse's duty to disclose arises from the state-law doctrine of informed consent. . . . These claims are independent of the collective-bargaining agreement and not preempted." *Id.*

Here, as in Hendy, there is no CBA or UPC provision that creates or precludes the duties that underlie the player's state tort-law claims. Therefore, none of those claims are dependent on the CBA, and none are preempted.

* * *

App. 138

No. 08-0926

IN THE SUPREME COURT OF TEXAS

DOUGLAS K. BROCAIL,

PETITIONER,

vs.

DETROIT TIGERS, INC.,

RESPONDENT.

RESPONSE TO PETITION FOR REVIEW

GARDERE WYNNE SEWELL LLP

Jeffrey S. Davis
State Bar No. 00783936
Peter Scaff
State Bar No. 24027837
Mike Seely
State Bar No. 24054148
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Telephone: (713) 276-5500
Facsimile: (713) 276-5555

ATTORNEYS FOR RESPONDENT, DETROIT TIGERS, INC.

* * *

[7] ARGUMENT & AUTHORITIES

A. Brocail's claims are preempted by federal labor law.

Although Brocail pled his claims as state law claims, which are admitted to be governed by Michigan law, his allegations must be treated as federal law claims under Section 301 of the Labor Management Relations Act (the "LMRA"), codified at 29 U.S.C. §§ 141-187. Section 301[1] provides the exclusive remedy for individual employees asserting claims against an employer that implicate a collective bargaining agreement. *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994); *Landry v. Cooper/T. Smith Stevedoring Co., Inc.*, 880 F.2d 846, 850 (5th Cir. 1989). When applicable, Section 301 "preempts" state law claims in that "only the federal law fashioned by the courts under Section 301 governs the interpretation and application of collective bargaining agreements." *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1176-77 (N.D.N.Y. 1990). Importantly, the preemptive effect of Section 301 applies to causes of action arising in both contract and tort. *Id.* at 1177

---

[1] Section 301 of the LMRA provides, in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties." 29 U.S.C. § 185(a).

(citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985)).

Brocail concedes that his claims are preempted if the Court determines the claims depend on the meaning of a collective bargaining agreement. However, his position that [8] his claims are wholly independent of the CBA is contradicted by the allegations in his pleadings and the notable opinion provided by his retained expert: "Read together, the Collective Bargaining Agreement, the UPC, and the Regulations establish that a Major League club, such as the Detroit Tigers, effectively has a non-delegable duty to provide reasonable and appropriate medical care to its players, including an obligation to provide proper treatment and rehabilitation for their injuries." (2 C.R. 603-04).

The ostensible duties to provide reasonable and appropriate medical care opined by Brocail's expert derived from the CBA, UPC and Regulations are encompassed within those duties that Brocail claims were breached in his live pleading and discovery responses, not only in connection with his now abandoned "contractual" claims, but also his remaining "tort" causes of action, as shown by the following comparison of a few of the dependent provisions:

BROCAIL'S ALLEGATION	CORRESPONDING §§ of CBA
The Tigers did not provide a proper second opinion before encouraging, endorsing and/or directing that Brocail undergo treatment (2 C.R. 492-93).	CBA at p. 40, and Attachment 7 to CBA (2 C.R. 534, 573).
The Tigers had a duty to provide medical treatment from providers that possessed the requisite expertise, skill, training, experience, ability, competence and/or knowledge (2 C.R. 492-99).	Regulation 2 and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
The Tigers had a duty to monitor Brocail's health, physical condition, conditioning and well being, the need for medical care and treatment, and the propriety of diagnoses rendered and treatments recommended by the team personnel and their effects on Brocail's health and performance (2 C.R. 492-99).	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).
[9] The Tigers had a duty of reasonable disclosure of the available choices with respect to the proposed therapy and of the dangers that are inherently and potentially involved in each	Regulation 2, and Attachment 7 to CBA (1 C.R. 138; 2 C.R. 573).

procedure to Brocail (2 C.R. 492-99).	
The Tigers had a duty to perform appropriate examinations, including pre-participation or qualifying status to identify future risk of injury, to determine Brocail's fitness to participate and/or continue to participate in baseball, to prevent subsequent injury (2 C.R. 492-99).	UPC para. 3.(a) and Regulation 2 (requiring Plaintiff to undergo medical treatment directed by the Tigers), and Attachment 7 to CBA (1 C.R. 134-35, 138; 2 C.R. 573).

As such, Brocail's claims depend on the collective bargaining agreement and are preempted by federal labor law.

* * *

NO. 08-0926

IN THE SUPREME COURT OF TEXAS

DOUGLAS K. BROCAIL,

Petitioner

v.

DETROIT TIGERS, INC.,

Respondent

On Petition for Review from Cause No. 14-06-00557-CV
In the Court of Appeals for the Fourteenth District of Texas

PETITIONER'S MOTION FOR REHEARING

Bruce E. Ramage
State Bar No. 16492500
Levon G. Hovnatanian
State Bar No. 10059825
MARTIN, DISIERE, JEFFERSON & WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Facsimile

Michael Lowenberg
State Bar No. 24001164
The O'Quinn Law Firm
2300 Lyric Centre Building
440 Louisiana
Houston, Texas 77002
(713) 223-1000 – Telephone
(713) 222-6903 – Facsimile

Thomas W. Pirtle
State Bar No. 16038610
LAMINACK, PIRTLE & MARTINES
5020 Montrose Blvd., 9th Floor
Houston, Texas 77006
(713) 292-2750 – Telephone
(713) 292-2755 – Facsimile

* * *

[1] I. THE LABOR MANAGEMENT RELATIONS ACT DOES NOT PREEMPT ANY OF BROCAIL'S CLAIMS.

A. Brocail's Causes Of Action

Brocail brought suit against the Tigers for negligence, gross negligence, negligent misrepresentation, fraud, fraudulent concealment, fraudulent inducement, and breach of contract. CR 64-82. He claimed that the Tigers encouraged and directed him to seek treatment from team personnel who did not possess the expertise to properly diagnose and treat his injury. CR 69. He further claimed that the Tigers:

- encouraged and directed him to undergo treatment that would not cure his injury;
- failed to establish policies and procedures for the treatment of its players;
- failed to follow team physicians' orders;
- failed to fully disclose the true extent of his condition and his fitness to play baseball;
- failed to use reasonable care to protect his health;
- failed to fully advise him of the adverse effects of continued medical and rehabilitative treatment;

[2] • failed to advise him of options regarding his condition;

- failed to provide a proper second opinion;

- failed to perform appropriate examinations;
- were negligent in hiring team personnel;
- misrepresented that the proposed treatment was appropriate for his condition; and
- fraudulently induced him to sign a contract with the Astros.

CR 68, 69-70, 72.

B. The Trial Court's Ruling

The Tigers moved for summary judgment on all of Brocail's claims. CR 83-132. In substantial part, they contended that Brocail's claims were governed by Major League Baseball's Collective Bargaining Agreement ("the baseball CBA") and were therefore preempted under section 301 of the Labor Management Relations Act ("the LMRA"). CR 95-118. The trial court granted the Tigers' motion. CR 759.

C. The Court Of Appeals' Holdings Regarding Preemption

The court of appeals held that Brocail's claims that the Tigers breached a duty to provide reasonable medical services are not preempted by the LMRA. *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 102 (Tex. App. – Houston [14th Dist.] 2008, pet. filed). The court was right, because the duties implicated by Brocail's claims regarding the failure to provide

reasonable medical services did not came from the baseball CBA, but from the [3] Michigan Worker's Disability Compensation Act ("the MWDCA"). *See* MICH. COMP. LAWS § 418.315(1).[1]

However, the court of appeals also held that adjudicating Brocail's claims that the Tigers fraudulently induced him to sign a contract with the Astros and failed to provide a proper second opinion require the interpretation of the baseball CBA. *Brocail,* 268 S.W.3d at 102-03. As will be shown below, (1) that was error, and (2) the error is of such importance to the jurisprudence of the state that this Court should intervene and correct it.

D. The Purpose Of CBAs

For decades, management and unions have negotiated CBAs as a means for achieving their respective labor goals. *American Fed'n of State, County & Mun. Employees v. Board of Educ.*, 577 N.W.2d 79, 84 (Mich. 1998). CBAs are contracts that govern various, and usually many, terms and conditions of employment. *See id.*; *Owens v. Press Pub. Co.,* 120 A.2d 442, 445 (N.J. 1956). Their "very purpose" is "to supersede individual contracts with terms which reflect the

---

[1] It is undisputed that Michigan law applies in this case. The trial court granted the Tigers' motion to apply Michigan law, which was not opposed. 1st Supp. CR 85, 564-75. The court of appeals also applied Michigan law. *Brocail,* 268 S.W.3d at 103-11.

strength and bargaining power and serve the welfare of the group." *Morton v. Essex Town Sch. Dist.*, 443 A.2d 447, 449 (Vt. 1981).

"Unlike contracts of adhesion, parties to a collective bargaining agreement usually are able to negotiate on an even playing field." *American Fed'n,* 577 N.W.2d at 84. That allows employers and unions to fairly work out the terms of their contracts, and to frequently agree on key conditions of employment. *Id.*

[4] **E. Enter The LMRA**

In 1947, Congress passed the LIMA. *National Treasury Employees Union v. Chertoff,* 385 F.Supp.2d 1, 29 (D.D.C. 2005), *modification denied*, 394 F.Supp.2d 137 (D.D.C. 2005), *aff'd in part, rev'd in part on other grounds,* 452 F.3d 839 (D.C. Cir. 2006). Congress's goals were to "promot[e] the arbitration of labor contract disputes [and] secur[e] the uniform interpretation of labor contracts." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108-09 (9th Cir. 2000).

In that regard, section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the

> amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1994). In some cases, but definitely not in all, this section has pre-emptive effect. *Wells v. General Motors Corp.*, 881 F.2d 166, 172 (5th Cir. 1989).

The intent of LMRA's pre-emptive reach is to fashion a uniform body of law regarding collective bargaining agreements and other labor contracts." *Trevino v. Ramos,* 197 F.3d 777, 779 (5th Cir. 1999). The Supreme Court explained precisely why it was important that section 301 have preemptive scope:

> The possibility that individual contract terms might have different meanings under. state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning [5] under two or more systems of law which might someday be invoked in enforcing the contract
>
> . . . .
>
> The importance of the area which would be affected by separate systems substantive law makes the need for a single body of feder ! law particularly compelling. The orderi and adjusting of competing interests throug

> a process of free and voluntary collective bargaining is the keystone of the federal scheme to provide industrial peace.

Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

F. But There Are Limits. . . .

The Supreme Court has also held that not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). "[E]ven under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983).

This "useful" limitation means that "although a plaintiff is a member of the collective bargaining unit, he may assert legal rights independent of the CBA under state law, so long as those rights do not derive from provisions of a *CBA*." *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 544 (5th Cir. 1990) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394-95 (1987)). If resolution of a state-law cause of action does not require construing a CBA, the cause of

action is "independent" of the CBA and not preempted. [6] *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). In other words, preemption is limited only to claims that "depend[] upon the meaning of a collective-bargaining agreement[.]" *Id.* at 405-06.

"The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc). When the parties do not dispute the meaning of contract terms, the fact that a CBA will be consulted in the course of state-law litigation does not require preemption. *Id.* at 690-91. In other words, the court's mere examination of a CBA to determine the preemption issue is not tantamount to interpreting the CBA. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1991). And of course, the fact that a defense is based on a CBA is by itself insufficient to require preemption. *Williams*, 482 U.S. at 398-99; *Cramer*, 255 F.3d at 690.

G. Because Their Resolution Does Not Require The Interpretation Of The Baseball CBA, Brocail's Claims Are Not Preempted.

Resolving Brocail's claims regarding fraudulent inducement and a second opinion does not require interpretation of the baseball CBA. Two recent

high-profile cases in which the courts rejected the same preemption defense the Tigers raise here illustrate that point.

1. *Stringer v. NFL*

Korey Stringer, an offensive lineman for the Minnesota Vikings, participated in the Vikings' 2001 summer training camp. *Stringer v. NFL*, 474 F.Supp.2d 894, 898 [7] (S.D. Ohio 2007). During a practice, he suffered heat exhaustion. *Id.* At the next morning's practice, he developed heatstroke and subsequently denied from its complications. *Id.*

Kelci Stringer, Korey Stringer's widow and the personal representative of his estate, sued several entities. 474 F.Supp.2d at 898. In general, she contended that Korey Stringer was forced to participate in practices conducted in extreme heat and humidity while wearing unsafe, heat-retaining, league-mandated equipment and without proper acclimatization, supervision, or medical care. *Id.*

Count four of her complaint alleged claims of negligence against the NFL and NFL Properties. 474 F.Supp.2d at 898, 911. Specifically, count four asserted that the NFL had a duty to ensure that the equipment and materials it required NFL players to wear were of the highest possible quality and sufficient to protect players from the risk of injury, including an increased the risk of heat-related illness. *Id.* at 899, 911-12. Count four also claimed that NFL Properties had a duty to ensure that the equipment

and materials it licensed and approved were of the highest possible quality and sufficient to protect players from the risk of injury, including an increased risk of heat-related illness. *Id.* at 899, 912. Count four further alleged that the NFL and NFL Properties breached those duties by requiring, approving, and/or licensing the use of Riddell helmets and shoulder pads, knowing or having reason to know that those products increased the risk of heat-related illness. *Id.* at 899, 912.

The defendants argued that all of Kelci Stringer's claims should be dismissed because they are pre-empted by section 301. 474 F.Supp.2d at 899. In regard to count four, the court disagreed. *Id.* at 912-13. In part, it reasoned:

> [8] Nor is resolution of Count 4 substantially dependent on an interpretation of any of the terms of the CBA, which is largely silent on the topic of equipment safety. As discussed earlier, although the CBA creates a "Joint Committee on Player Safety and Welfare . . . for the purpose of discussing the player safety and welfare aspects of playing equipment," (CBA, Art. XIII, § 1(a)), the NFL Defendants are not members of that committee and are not required to adopt the committee's recommendations. In short, there is no need to interpret that provision, or any other, to determine whether the NFL Defendants owed Korey Stringer a duty to ensure that he had safe equipment, whether they breached that duty, or whether the

> alleged breach proximately caused his death. The Court therefore concludes that Count 4 of Plaintiff's complaint is not preempted.

Id. at 912-13. The duty to ensure that the equipment used by NFL players adequately protects against risk of injury or illness, "if it exists, clearly has its source in the common law," not the CBA. *Id.* at 912.

2. *Brown v. NFL*

In a 1999 football game, an NFL referee threw a penalty flag which flew through an opening in Cleveland Browns offensive lineman Orlando Brown's helmet and struck him in the eye. *Brown v. NFL*, 219 F.Supp.2d 372, 376 (S.D.N.Y. 2002). The injury to his eye ended Brown's NFL career. *Id.*

Brown sued the NFL, alleging that the league was liable for his injuries, both in its own right for negligent hiring and training of the referee, and vicariously, as the referee's employer, for his negligence in throwing the flag. 219 F.Supp.2d at 376. Specifically, Brown claimed that the NFL breached its duty to him and to the general public to hire and employ competent referees for NFL games, to train and supervise its referees, to ensure that its referees not throw penalty flags directly at a person when calling an infraction, to ensure that penalty flags not be unsafely weighted in violation of NFL rules, [9] regulations, and guidelines, and to train its employees in the proper manner of throwing penalty flags. *Id.* The court summarized Brown's allegations:

> Plaintiffs' theory of the case is that this is a garden variety tort action invoking a general duty to avoid negligently causing harm, owed by the NFL not only to its players but also to any other person in society who could possibly have been threatened by [the referee]'s weighted projectile. They contend that a fan, member of the press, or other bystander could equally bring such a claim had he or she been injured in the same manner. On this view, whether [the referee] or the NFL was negligent, or whether the NFL has a valid defense that Brown assumed the risk of such an injury by playing professional football (or any other defense to the action), are simply ordinary issues of state tort law . . .

Id. at 376-77.

The NFL maintained that Brown's lawsuit was really a dispute over the terms of the CBA between the NFL Players Association (the players' union) and the teams comprising the NFL. 219 F.Supp.2d at 376. The NFL therefore argued that section 301 preempted Brown's claims. *Id.*

The court acknowledged that "[i]t is well established . . . that § 301 completely preempts state law claims, including tort law claims, that involve the interpretation and application of a CBA." 219 F.Supp.2d at 378. "It does not follow, however, that any state tort suit brought by an employee covered by a CBA is preempted by the LMRA." *Id.* "The LMRA does not preempt a claim that merely 'relates in some way to a

provision in a collective-bargaining agreement.'" *Id.* (quoting *Allis-Chalmers*, 471 U.S. at 211). The court was therefore bound to "ask whether the CBA between the team owners and the NFLPA must be interpreted in order to adjudicate Brown's claim of negligence on the part of [the referee] in throwing the flag or of the NFL in hiring, [10] training and supervision, or whether Brown's claims rest on an independent state law duty that binds the NFL apart from the CBA." *Id.* at 379.

In determining the issue, the court noted that "[i]f there is a free-standing state tort duty, the Supreme Court has repeatedly advised that 'it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.'" 219 F.Supp.2d at 379-80 (quoting *Allis-Chalmers*, 471 U.S. at 211-12). If a tort claim alleges a violation of a duty "owed to every person in society," as opposed to a duty owed only to employees covered by the CBA, it is independent of the CBA. *Id.* at 380 (citing *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990)).

There was "substantial authority [in the applicble state law] . . . that an employer may be liable to a third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit." 219 F.Supp.2d at 380 (citing N.Y. Jur. 2d, Employment Relations § 325 (1996)). In such cases, "negligence typically consisted of 'hiring or retaining the employee with knowledge of his [or her] unfitness, or of failing to use reasonable care to discover it before

hiring or retaining him [or her].'" *Id.* (quoting section 325).

In Brown's negligence claim, he had clearly alleged that the referee was unfit; the NFL was negligent in failing to use reasonable care to discover his unfitness and cure it by terminating him or successfully training him; and such negligence was a proximate cause of his injury. 219 F.Supp.2d at 380. "No contractual relation between the plaintiff [11] and the employer is necessary to such a tort action; a similar cause of action would lie in favor of any member of the public injured by an unfit employee." *Id.*

The duties asserted by Brown were duties owed to the general public; were not "creatures of contract"; and were instead based on state tort law. 219 F.Supp.2d at 380, 382. As such, "the claims are not preempted by § 301 of the LMRA and Plaintiffs must be permitted to pursue their state law tort claims." *Id.* at 387.

3. The court of appeals should have reached the same result as the *Stringer* and *Brown* courts.

Like the duties in *Stringer* and *Brown*, it was state law, not the baseball CBA, which imposed on the Tigers a duty not to make fraudulent misrepresentations. *See Hi-Way Motor Co. v. International Harvester Co.*, 247 N.W.2d 813, 815-16 (Mich. 1976). That duty, too, is one owed to the general public. *See*

Hassberger v. General Builders' Supply Co., 182 N.W. 27, 28 (Mich. 1921).

It is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. In fact, several courts have held that section 301 does not preempt a state-law claim involving fraud. *See, e.g., Voilas v. General Motors Corp.*, 170 F.3d 367, 378 (3d Cir. 1999) ("In sum, the fraud claim in this case is not directly based upon the collective bargaining agreements in force between the parties; nor will the resolution of the elements of common-law fraud require the interpretation of those bargaining agreements. . . . Consequently there is no ground for section 301 preemption in this case."); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 232 (3d Cir. 1995) (where employees covered by CBA brought claims against their employer for fraud, court held that section [12] 301 did not preempt fraud claims because "[a]n examination of the employer's behavior, motivation, and statements does not substantially depend upon the terms of the collective bargaining agreement"); *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535, 539 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992) ("We hold that the Wilsons' state tort claim for fraud in the inducement is not preempted by section 301 because it does not require reference to the collective bargaining agreement.").[2]

---

[2] It is not just state-law claims involving fraud that fell outside section 301 preemption, Courts of appeals have frequently

(Continued on following page)

Likewise, the Tigers' duty to provide a second opinion exists in state law; specifically, in section 418.315(1) of the MWDC, which provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment

---

held that state-law claims of other intentional torts brought by employees covered by a CBA are not preempted, either. *See, e.g., Hayden v. Reickerd*, 957 F.2d 1506, 1511, 1513 (9th Cir. 1991) (conspiracy and battery); *Galvez v. Kuhn*, 933 F.2d 773, 778-80, 781 (9th Cir. 1991) (assault and battery); *Hanks v. General Motors Corp.*, 906 F.2d 341, 345 (8th Cir. 1990) (intentional infliction of emotional distress); *Keehr v. Consolidated Freightways*, 825 F.2d 133, 135-37 (7th Cir. 1987) (invasion of privacy and intentional infliction of emotional distress).

Cases in which a court has found that an intentional-tort claim is preempted are readily distinguishable. For example, in *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997), the employee's claims for intentional infliction of emotional distress and fraudulently misrepresenting the facts related to his termination were preempted by section 301 because resolution of the claims would require the court to determine whether the employee's discharge was warranted under the terms of a CBA. *Id.* at 1149. And in *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), the employee's invasion-of-privacy claim was preempted by section 301 because resolution of the claim would involve consideration of the employer's power under a CBA to conduct searches of employees and their cars when drug use is suspected. *Id.* at 256. Here, by contrast, it is not necessary to interpret the CBA to resolve Brocail's fraud claim.

> recognized by the laws of this state as legal, when they are needed.

MICH. COMP. LAWS § 418.315(1). There is no doubt that this law creates duties that are owed to the general public. *See Wells v. Firestone Tire & Rubber Co.*, 364 N.W.2d 670, [13] 674 (Mich. 1984) ("The statutory workers' compensation scheme was enacted for the protection of both employees and employers who work and do business in this state.").

It is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. *"[A]s long as the state-law claim can be resolved without interpreting the agreement itself*, the claim is 'independent' of the agreement for § 301 preemption purposes." *Lingle*, 486 U.S. at 409-10 (emphasis added); *see Coefield v. Jersey Cent. Power & Light Co.*, 532 F.Supp.2d 685, 692 (D.N.J. 2007) (quoting *Lingle* and observing that the Supreme Court found it "irrelevant" that the state-law analysis may involve the same factual considerations as an inquiry under the CBA).

The court of appeals erred in holding that Brocail's claims regarding fraud and the failure to provide a second opinion are preempted. After all, as the Supreme Court observed in *Lingle*, "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." 486 U.S. at 411.

H. Conclusion Regarding Preemption

The Supreme Court has "stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward." *Livadas v. Bradshaw*, 512 U.S. 107, 122-24 (1994). The Court has been "clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be [14] extinguished." *Id.* Based on these same principles, section 301 does not preempt Brocail's claims.

* * *

hiring or retaining him [or her].'" *Id.* (quoting section 325).

In Brown's negligence claim, he had clearly alleged that the referee was unfit; the NFL was negligent in failing to use reasonable care to discover his unfitness and cure it by terminating him or successfully training him; and such negligence was a proximate cause of his injury. 219 F.Supp.2d at 380. "No contractual relation between the plaintiff [11] and the employer is necessary to such a tort action; a similar cause of action would lie in favor of any member of the public injured by an unfit employee." *Id.*

The duties asserted by Brown were duties owed to the general public; were not "creatures of contract"; and were instead based on state tort law. 219 F.Supp.2d at 380, 382. As such, "the claims are not preempted by § 301 of the LMRA and Plaintiffs must be permitted to pursue their state law tort claims." *Id.* at 387.

3. The court of appeals should have reached the same result as the *Stringer* and *Brown* courts.

Like the duties in *Stringer* and *Brown*, it was state law, not the baseball CBA, which imposed on the Tigers a duty not to make fraudulent misrepresentations. *See Hi-Way Motor Co. v. International Harvester Co.*, 247 N.W.2d 813, 815-16 (Mich. 1976). That duty, too, is one owed to the general public. *See*

Hassberger v. General Builders' Supply Co., 182 N.W. 27, 28 (Mich. 1921).

It is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. In fact, several courts have held that section 301 does not preempt a state-law claim involving fraud. *See, e.g., Voilas v. General Motors Corp.*, 170 F.3d 367, 378 (3d Cir. 1999) ("In sum, the fraud claim in this case is not directly based upon the collective bargaining agreements in force between the parties; nor will the resolution of the elements of common-law fraud require the interpretation of those bargaining agreements. . . . Consequently there is no ground for section 301 preemption in this case."); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 232 (3d Cir. 1995) (where employees covered by CBA brought claims against their employer for fraud, court held that section [12] 301 did not preempt fraud claims because "[a]n examination of the employer's behavior, motivation, and statements does not substantially depend upon the terms of the collective bargaining agreement"); *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535, 539 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992) ("We hold that the Wilsons' state tort claim for fraud in the inducement is not preempted by section 301 because it does not require reference to the collective bargaining agreement.").[2]

---

[2] It is not just state-law claims involving fraud that fell outside section 301 preemption, Courts of appeals have frequently

(Continued on following page)

Likewise, the Tigers' duty to provide a second opinion exists in state law; specifically, in section 418.315(1) of the MWDC, which provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment

---

held that state-law claims of other intentional torts brought by employees covered by a CBA are not preempted, either. *See, e.g., Hayden v. Reickerd*, 957 F.2d 1506, 1511, 1513 (9th Cir. 1991) (conspiracy and battery); *Galvez v. Kuhn*, 933 F.2d 773, 778-80, 781 (9th Cir. 1991) (assault and battery); *Hanks v. General Motors Corp.*, 906 F.2d 341, 345 (8th Cir. 1990) (intentional infliction of emotional distress); *Keehr v. Consolidated Freightways*, 825 F.2d 133, 135-37 (7th Cir. 1987) (invasion of privacy and intentional infliction of emotional distress).

Cases in which a court has found that an intentional-tort claim is preempted are readily distinguishable. For example, in *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997), the employee's claims for intentional infliction of emotional distress and fraudulently misrepresenting the facts related to his termination were preempted by section 301 because resolution of the claims would require the court to determine whether the employee's discharge was warranted under the terms of a CBA. *Id.* at 1149. And in *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), the employee's invasion-of-privacy claim was preempted by section 301 because resolution of the claim would involve consideration of the employer's power under a CBA to conduct searches of employees and their cars when drug use is suspected. *Id.* at 256. Here, by contrast, it is not necessary to interpret the CBA to resolve Brocail's fraud claim.

> recognized by the laws of this state as legal, when they are needed.

MICH. COMP. LAWS § 418.315(1). There is no doubt that this law creates duties that are owed to the general public. *See Wells v. Firestone Tire & Rubber Co.*, 364 N.W.2d 670, [13] 674 (Mich. 1984) ("The statutory workers' compensation scheme was enacted for the protection of both employees and employers who work and do business in this state.").

It is not necessary to interpret the CBA to resolve that claim and the claim is not preempted. *"[A]s long as the state-law claim can be resolved without interpreting the agreement itself*, the claim is 'independent' of the agreement for § 301 preemption purposes." *Lingle*, 486 U.S. at 409-10 (emphasis added); *see Coefield v. Jersey Cent. Power & Light Co.*, 532 F.Supp.2d 685, 692 (D.N.J. 2007) (quoting *Lingle* and observing that the Supreme Court found it "irrelevant" that the state-law analysis may involve the same factual considerations as an inquiry under the CBA).

The court of appeals erred in holding that Brocail's claims regarding fraud and the failure to provide a second opinion are preempted. After all, as the Supreme Court observed in *Lingle*, "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." 486 U.S. at 411.

H. Conclusion Regarding Preemption

The Supreme Court has "stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward." *Livadas v. Bradshaw*, 512 U.S. 107, 122-24 (1994). The Court has been "clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be [14] extinguished." *Id.* Based on these same principles, section 301 does not preempt Brocail's claims.

* * *

---

(2)

No. 09-72

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DOUGLAS K. BROCAIL,

Petitioner,

v.

DETROIT TIGERS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourteenth District Of Texas

PETITION FOR REHEARING

LEVON G. HOVNATANIAN
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Facsimile

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING	1
I. INTRODUCTION	1
II. THE EVIDENCE	2
III. PRINCIPLES OF SECTION 301 PREEMPTION	4
IV. GROUND FOR REHEARING	5
A. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Third Circuit Gets It Right	5
B. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Eighth Circuit Gets It Wrong	10
V. THE COURT SHOULD GRANT REVIEW	14
GOOD FAITH CERTIFICATION OF COUNSEL	15

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 4

Beidleman v. Stroh Brewery Co., 182 F.3d 225 (3d Cir. 1999) 9

Brocail v. Detroit Tigers, Inc., 268 S.W.3d 90 (Tex. App. – Houston [14th Dist.] 2008, pet. denied) 1, 13

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (en banc) 4

Felix v. Lucent Techs., Inc., 387 F.3d 1146 (10th Cir. 2004) 7, 8

Foy v. Pratt & Whitney Group, 127 F.3d 229 (2d Cir. 1997) 8, 12, 13

Kittle v. Prudential Ins. Co., 102 F.Supp.2d 1029 (S.D. Ind. 2000) 8

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 4, 6, 8, 13, 14

Livadas v. Bradshaw, 512 U.S. 107 (1994) 4, 7, 13

Loewen Group Int'l v. Haberichter, 65 F.3d 1417 (7th Cir. 1995) 14

Merrill Lynch, Pierce, Fenner & Smith v. Barchman, 916 F.Supp. 845 (N.D. Ill. 1996) 5

Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993) 12, 14

TABLE OF AUTHORITIES – Continued

Page

Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207 (9th Cir. 1999) 4

Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc., 270 F.3d 1018 (6th Cir. 2001), *cert. denied, International Ass'n of Bridge, Structural, & Ornamental Iron Workers v. Walcher & Fox, Inc.*, 535 U.S. 1017 (2002) 4

Operating Eng'rs Pension Trust v. Wilson, 915 F.2d 535 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992) 4

Trans Penn Wax Corp. v. McCandless, 50 F.3d 217 (3d Cir. 1995) 5, 6, 8, 9

Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450 F.3d 324 (8th Cir. 2006) 11

In re United States Office Prods. Co. Secs. Litig., 251 F.Supp.2d 77 (D.D.C. 2003) 5

Voilas v. General Motors Corp., 170 F.3d 367 (3d Cir. 1999) 6, 7, 9

Williams v. NFL, ___ F.3d ___, 2009 WL 2901928 (8th Cir. Sept. 11, 2009) 10

STATUTES

29 U.S.C. § 185(a) 2

PETITION FOR REHEARING

On October 5, 2009, the Court denied Douglas K. Brocail's petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth District of Texas in *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. App. – Houston [14th Dist.] 2008, pet. denied). This petition for rehearing is timely filed under Supreme Court Rule 44(2), which states in relevant part that "[a]ny petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . "

I. INTRODUCTION

This appeal arose from the trial court's grant of summary judgment to the Detroit Tigers, Inc. on all of Brocail's claims against the Tigers. On April 3, 2008, the court of appeals issued its opinion and judgment affirming the trial court's summary judgment. *Brocail*, 268 S.W.3d at 90, 94, 111.

The court of appeals held that section 301(a) of the Labor Management Relations Act preempted Brocail's claim that the Tigers fraudulently induced him to sign a contract with the Houston Astros because that claim requires the interpretation of Major League Baseball's Collective Bargaining Agreement ("CBA"). *Brocail*, 268 S.W.3d at 102-03. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization

> representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

II. THE EVIDENCE

The Tigers signed Brocail, a relief pitcher, to a guaranteed contract under which they agreed to pay him salaries of $900,000 in 2000 and $2,000,000 in 2001. Later, during the 2000 season, Brocail began to experience arm problems.

The Tigers required Brocail to see their team physicians. His symptoms indicated a partially torn medial collateral ligament, but one of the Tigers' team doctors said Brocail only had bone chips in his elbow.

The Tigers put Brocail on the disabled list in August 2000 and urged him to undergo what they represented was the appropriate treatment. Brocail specifically asked whether he had a torn ligament, but the Tigers said his problem was just loose bone fragments.

Believing the Tigers, Brocail had surgery on September 22, 2000. He then began physical therapy.

Major League Baseball's annual winter meetings, during which trades are traditionally made, were scheduled for December. The Tigers could get more for Brocail in a trade if it appeared the surgery had been successful. Trading Brocail would also allow the Tigers to unload his large guaranteed contract.

By November of 2000, Brocail was still going to physical therapy. He was not even able to throw a baseball yet. But on November 7, 2000 – less than two months after the surgery and in time for the winter meetings – the Tigers took Brocail off the disabled list. Then, during the winter meetings, they traded him to the Astros, relieving themselves of his $2,000,000 salary.

Brocail had, not bone chips in his elbow, but a complete tear of the medial collateral ligament and a near-complete tear of the flexor tendon in his pitching arm. He was forced to undergo major surgery to address the injuries.

Brocail could not pitch in 2001, 2002, or 2003, and received no salary in 2002 and 2003. He was finally able to return to baseball during the 2004 season.

Brocail sued the Tigers in state court, alleging they had fraudulently induced him to sign a contract with the Astros.

III. PRINCIPLES OF SECTION 301 PREEMPTION

If resolution of a state-law cause of action does not require actual interpretation of a CBA, the claim is "independent" of the CBA and not preempted. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). Even a need to "look to" a CBA is not enough to find section 301 preemption of a state-law claim. *Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994).

"The plaintiff's claim is the touchstone for [a section 301 preemption] analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc). Applied in tort cases, that rules means that a court must determine "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Because it frequently is not, numerous courts have held that section 301 did not preempt a state-law fraud claim.[1]

---

[1] *See, e.g., Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1031 (6th Cir. 2001), *cert. denied, International Ass'n of Bridge, Structural, & Ornamental Iron Workers v. Walcher & Fox, Inc.*, 535 U.S. 1017 (2002); *Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207, 1212 (9th Cir. 1999); *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535, 539 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992).

IV. GROUND FOR REHEARING

That a plaintiff bringing a state-law fraud claim must prove reasonable reliance on the representation is practically a universal rule. *See In re United States Office Prods. Co. Secs. Litig.*, 251 F.Supp.2d 77, 101 (D.D.C. 2003); *Merrill Lynch, Pierce, Fenner & Smith v. Barchman*, 916 F.Supp. 845, 854 (N.D. Ill. 1996). The question thus becomes whether a CBA must be interpreted in order to determine if the plaintiff's reliance on the representation was reasonable. As will be discussed below, two competing lines of cases have emerged, and an opinion issued just last month has brought the question to the forefront again.

A. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Third Circuit Gets It Right.

In *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995), members of a collective bargaining unit brought a state-law fraud claim against their employer based on promises of job security. *Id.* at 220. The employer "insist[ed] section 301 preempts the employees' fraud claims because proof of fraud requires clear and convincing evidence of justifiable reliance by the recipient upon the misrepresentation. Such an analysis, [the employer] argue[d], requires an interpretation of the [CBA] to determine if the employees justifiably relied on representations guaranteeing job security." 50 F.3d at 231.

The Third Circuit observed that the law of the pertinent state requires a plaintiff alleging fraud to prove justifiable reliance on the misrepresentation. 50 F.3d at 232. The court then held:

> [T]he employees need not depend on the [CBA] to satisfy these elements of state law fraud. This is not a situation . . . where the alleged tort is a violation of duties assumed in the [CBA]. **An examination of the employer's behavior, motivation, and statements does not substantially depend upon the terms of the [CBA]**. The essence of the employees' case is proof of justifiable reliance on the separate guarantees, not on the [CBAs]. As in *Lingle*, **"[e]ach of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer," and may be appropriately resolved under state law.**

Id. (citations omitted).

In *Voilas v. General Motors Corp.*, 170 F.3d 367 (3d Cir. 1999), former GM employees alleged that GM fraudulently induced them to accept early retirement. *Id.* at 370. GM argued that the "reasonable reliance" issue required interpretation of the CBA because one could not determine whether the plaintiffs acted reasonably without weighing all of the contractual options available to them. *Id.* at 376-77. But the Third Circuit noted that "the reliance inquiry is not, as GM suggest[ed], an investigation of the wisdom of the particular choice made by the claimant, but

instead whether the claimant was acting justifiably or reasonably in giving credence to the alleged misrepresentation." *Id.* at 377. **"[T]he reliance question focuses on whether GM's repeated insistence that the plant was going to close was a representation worthy of belief. Patently, this is not a question that depends upon an interpretation of the [CBA]."** *Id.* (emphasis added).

Nor would "resolving whether the employees' reliance was detrimental [ ] require an investigation of the terms of the [CBAs]." 170 F.3d at 377. The court elaborated:

> To be sure, we anticipate that at trial . . . the question whether the plaintiffs were worse off for having taken early retirement may arise. However, the fact that the parties' agreements may be referred to in the course of deciding this issue is of little moment to the preemption question before us. As the Court emphasized in *Livadas*, "the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."

Id. (quoting *Livadas*, 512 U.S. at 124).

Other courts have taken the same approach as the Third Circuit. In *Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146 (10th Cir. 2004), the defendant "argue[d] that Plaintiffs' fraud claims will require us to interpret the CBA . . . Defendant correctly points out that Oklahoma law requires as an element of

fraud 'reasonable reliance' on misrepresentations . . . " *Id.* at 1164-65 (citation omitted). The Tenth Circuit concluded that the issue was the parties' conduct, not the meaning of the CBA:

> Plaintiffs do not allege that Defendant made any misrepresentations about the terms or application of the . . . CBA. Rather, they allege that Defendant lied in informing them regarding the *choice* between retiring under the June plan or waiting until later. Therefore, there is simply no need to interpret the . . . CBA in order to ascertain whether Defendant's representations were false, and the actual meaning of the CBA . . . is not in dispute. . . . **Plaintiffs' state law misrepresentation claims "depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it."**

Id. at 1165 (quoting *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 235 (2d Cir. 1997)) (emphasis added).

In *Kittle v. Prudential Insurance Co.*, 102 F.Supp.2d 1029 (S.D. Ind. 2000), the defendant "essentially suggest[ed] that resolution of Kittle's state law claims is substantially dependant upon an analysis of the . . . CBA[.]" *Id.* at 1036. Relying on *Lingle* and *McCandless*, the district court concluded otherwise:

> Kittle plainly asserts state law claims for actual fraud, and arguably for constructive fraud as well. . . . [E]ach tort requires a plaintiff to prove in part that the defendant deceptively represented a past or existing material fact and that the plaintiff reasonably relied on the misrepresentation.
>
> The factual core of these claims is straightforward and discernable without interpretation of the [CBA]. Kittle simply alleges that Kemmerer represented and promised that Kittle would receive exclusive responsibility for Agency 68, an alleged fact at odds with his actual assignment to Agency 417 . . . [W]e find that consultation or analysis of the CBA is wholly unnecessary to resolve these factual matters.

Id. (citations omitted).

The issue of whether the employee reasonably relied on the alleged misrepresentation invokes the employer's motivation, behavior, and statements, and the employee's understanding and reaction. It does not require interpretation of a CBA. Therefore, as the Third Circuit has held, it should not be a basis of section 301 preemption.[2]

---

[2] When the essence of the state-law fraud claim is that the employees were fraudulently denied their rights *under the agreement itself* – facts that are "patently different" from *McCandless* and *Voilas* – the Third Circuit does not hesitate to find preemption. *See Beidleman v. Stroh Brewery Co.*, 182 F.3d 225, 234 (3d Cir. 1999).

B. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Eighth Circuit Gets It Wrong.

In *Williams v. NFL*, ___ F.3d ___, 2009 WL 2901928 (8th Cir. Sept. 11, 2009), the NFL suspended Kevin Williams and Pat Williams, defensive linemen for the Minnesota Vikings, after they tested positive for a banned substance. *Id.* at *3. The Williams sued several defendants, including the NFL, for fraud. *Id.* at *5 n.7.

The defendants argued that the Williams' fraud claim was "preempted because the Players cannot demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA[.]" 2009 WL 2901928 at *13. The Eighth Circuit agreed:

> [T]he question of whether the Players can show that they reasonably relied on the lack of a warning that StarCaps [the dietary supplement they took] contained bumetanide [the banned substance] cannot be ascertained apart from the terms of the Policy [which was expressly incorporated into the CBA] . . . Because resolving the Players' misrepresentation claims will require interpretation of the Policy, they are preempted by section 301.

Id. at *13. The court reasoned:

> One can only justifiably rely on a statement which conflicts with the provisions of a

> written agreement it has signed if the agreement is couched in ambiguous legal language which a layman could reasonably believe supported the representation.
>
> . . . To determine whether [the plaintiff] justifiably relied on the oral assurances allegedly made by the [defendant], the trier of fact would have to determine whether the contractual language in the CBA was ambiguous enough for a layman reasonably to believe that it was not contrary to the representations on which [the plaintiff] claims it relied. This would require the trier of fact to examine the provisions in the CBA. . . . Since [the plaintiff] has the burden . . . to establish justifiable reliance, it would have to show that all of the cited provisions of the CBA could plausibly be read together to be consistent with its alleged understanding . . . Adjudication of the dispute and resolution of the . . . claims will necessarily involve interpretation of the CBA.

Id. (quoting *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331, 332 (8th Cir. 2006)).

The Eighth Circuit's rationale leads to preemption when it is necessary only to *read* the CBA – to read it to determine if it contains a term which contradicts the defendant's alleged representation. In other words, when the plaintiff alleges that the defendant said X, the Eighth Circuit finds preemption on the ground that one must look at the CBA

to determine whether it states the opposite of X. "But the review of the CBA needed to decide preemption in this case is not in itself 'interpretation' warranting preemption; if it were, the preemption doctrine under § 301 would swallow the rule that employees can assert nonnegotiable state law rights that are independent of their [CBAs]." *Foy*, 127 F.3d at 235 (citing *Milne Employees Ass'n v. Sun Carriers,* 960 F.2d 1401, 1409-10 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)).

To assert that the justifiable reliance element will require interpretation of the CBA

> proves too much: a [CBA] can always be consulted to determine whether an employee is justified in relying upon an employer's promise. The argument comes down to the idea that an employee is never justified in relying upon any promise by the employer that is not enforceable under a CBA. If that were so, the existence of a CBA would require preemption in all cases involving representations made to employees. But the Supreme Court has recently clarified that § 301 preemption applies only when necessary "to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, nor by parties' efforts to renege on their arbitration promises by relabeling

> as tort suits actions simply alleging breaches of duties assumed in [CBAs]."

Foy, 127 F.3d at 235 (quoting *Livadas*, 512 U.S. at 122-23).

If resolving a state-law cause of action requires *interpreting* a CBA, there is no doubt the claim is preempted. *See Lingle*, 486 U.S. at 407. But the fact that a CBA will be merely *consulted* in the course of state-law litigation does not require preemption. *Livadas*, 512 U.S. at 124.

The Fourteenth Court of Appeals made the same mistake the Eighth Circuit made. It held that "[b]ecause the CBA governs assignment of his contract, Brocail's claim that the [Tigers] fraudulently induced him to enter a contract with the Astros is preempted. In particular, it is necessary to interpret the CBA to determine whether Brocail's consent to the assignment was necessary, and whether reliance on any representation by the [Tigers] concerning assignment of his contract was reasonable in light of the CBA." *Brocail*, 268 S.W.3d at 103 (citation omitted).

Whether Brocail's consent was necessary can be determined from simply reviewing the CBA. No interpretation is necessary.

Likewise, the question of whether Brocail's reliance on any representation the Tigers made was reasonable requires consulting, but not construing, the CBA. There is no provision in the CBA that sets a standard for reasonable reliance or somehow

precluded Brocail from relying on the Tigers' representations.

V. THE COURT SHOULD GRANT REVIEW.

A need for interpretation is required for section 301 preemption, and a court's mere *examination* of a CBA is not tantamount to interpreting it. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995); *Milne Employees Ass'n*, 960 F.2d at 1409. Losing sight of the latter fact, the Fourteenth Court and the Eighth Circuit have put the simple review of a CBA on par with interpretation. As a result, the type of garden-variety, state-law tort claims which preemption was never intended to reach are being wrongly extinguished. To vindicate the longstanding rule that "as long as the state-law claim can be resolved without *interpreting* the agreement," the claim is not preempted (*Lingle*, 486 U.S. at 409-10 (emphasis added)), Brocail respectfully asks the Court to grant this petition, hear his case, and reassert the dispositive distinction.

Respectfully submitted,

LEVON G. HOVNATANIAN
Counsel of Record
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Facsimile

Attorneys for Petitioner
Douglas K. Brocail

GOOD FAITH CERTIFICATION OF COUNSEL

Pursuant to United States Supreme Court Rule 44(2), I hereby certify that (1) this petition for rehearing is presented in good faith and not for delay, and (2) this Petition for Rehearing is restricted to the grounds specified in Rule 44(2). Specifically, this Petition for Rehearing is restricted to "other substantial grounds not previously presented."

Signed this 27th day of October, 2009.

LEVON G. HOVNATANIAN
Counsel of Record
MARTIN, DISIERE, JEFFERSON
& WISDOM, L.L.P.
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700 – Telephone
(713) 222-0101 – Facsimile

Attorneys for Petitioner
Douglas K. Brocail